BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	Rulemaking 93-04-003 (Filed April 7, 1993)
Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Networks.	Investigation 93-04-002 (Filed April 7, 1993) (Interim Arbitration, Line Sharing Phase)

FINAL ARBITRATOR'S REPORT

May 26, 2000

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FINAL ARBITRATOR'S REPORT

1. Summary

Appendix DSL proposed by Pacific Bell Telephone Company, and the Line Sharing Amendment proposed by GTE California Incorporated, are adopted subject to the modifications ordered herein. By June 2, 2000, parties shall file and serve contract language consistent with the decisions in this Final Arbitrator's Report. The contract language shall be in the form of an appendix or amendment that any competitive local exchange carrier may adopt. Parties shall also file and serve signed appendices or amendments to existing interconnection agreements, and newly signed interconnection agreements with appendices or amendments which provide for line sharing. The signed appendices, amendments, and new agreements shall be effective on or before June 6, 2000.

Parties shall also file and serve statements by June 2, 2000. The statements shall indicate whether the appendices, amendments, or agreements should be adopted or rejected by the California Public Utilities Commission.

Pacific and GTE shall also file and serve limited additional items as required herein. Further, Pacific and GTE shall subsequently amend without delay their line sharing appendices or amendments to conform with any order of the Federal Communications Commission that provides for xDSL line sharing or transport over the fiber portion of the local loop, or over a UNE-P. Pacific and GTE shall amend their line sharing appendices or amendments no less than 30 days before the first day the company carries xDSL service of their own customer, or the customer of a corporate affiliate, over the fiber portion of their local loop so that service by the incumbent and competitor may begin simultaneously. Pacific and GTE shall also record in a memorandum account all revenues from access rates to the high frequency portion of the local loop, and

revenues from other recurring and non-recurring rates which contribute to joint and common costs. Finally, limited restrictions are adopted on the decommissioning of copper local loop plant during the interim period.

2. Background

On December 9, 1999, the Federal Communications Commission (FCC) issued a decision requiring incumbent local exchange carriers (ILECs) to provide competitors access to the high frequency portion of the local loop.[1] In its order, the FCC finds that the high frequency portion of the loop meets the statutory definition of a network element and must be unbundled pursuant to §§ 251(d)(2) and 251(c)(3) of the federal Telecommunications Act of 1996 (Act).

The California legislature also addressed this issue in Assembly Bill (AB) 991.[2] AB 991 requires that the California Public Utilities Commission (CPUC) "comply with, and implement, in a manner that the Public Utilities Commission determines to be appropriate," the FCC's order within 90 days from its publication in the Federal Register. The FCC published its order on January 10, 2000. The 90th day thereafter was April 10, 2000.

In order to meet the time requirements of AB 991, on January 31, 2000 the Chief Administrative Law Judge issued a Ruling. The Ruling ordered that within 30 days (i.e., by March 1, 2000) Pacific Bell Telephone Company (Pacific) and GTE California Incorporated (GTE) file an offer to amend existing

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[1] Third Report and Order in CC Docket No. 98-147, and Fourth Report and Order in CC Docket No. 96-98 (Line Sharing Order).

[2] AB 991 (Stats. 1999, Ch. 714), titled the "California High Speed Internet Access Act of 1999," codified in California Public Utilities Code § 709.7.

interconnection agreements (ICAs) to provide line sharing services.[3] The offer was to be written in language that could be directly inserted in the existing ICA of any competitive local exchange carrier (CLEC or CLC). It was to include interim prices subject to subsequent true-up adjustment, as well as terms and conditions of service in compliance with the requirements set forth in the FCC's Line Sharing Order.

The Chief Judge's Ruling further required that Pacific and GTE submit agreed upon amendments to ICAs by Advice Letter to the CPUC's Telecommunications Division within five days of the agreement with a CLC. The Advice Letters would be deemed approved 30 days after the date of filing, unless rejected by the CPUC. (Rule 6.2, Resolution ALJ-178.) This process allowed eligible CLCs to amend their ICAs so that line sharing for CLCs could be instituted by April 10, 2000.

The Ruling also directed that CLCs who either did not have an existing ICA, or who chose not to amend their existing agreements based on the ILEC's offer, negotiate with Pacific and GTE for line sharing services pursuant to CPUC rules for arbitration. (Rule 3, Resolution ALJ-178.) Parties were invited to submit comments by February 15, 2000 on the structure for the interim arbitration process, along with the scope and schedule.

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[3] "Line sharing generally describes the ability of two different service providers to offer two services over the same line, with each provider employing different frequencies to transport voice or data over that line. The high frequency portion of the loop is used to provide digital subscriber line technology (commonly referred to as xDSL), which permits the transmission of data over the copper loop at significantly higher speeds than can be achieved by current 'dial-up' analog data transmission systems and circuit-switched network systems." (Chief Judge's Ruling dated January 31, 2000, page 1, footnote 1.)

By Administrative Law Judge and Assigned Commissioner's Ruling dated February 25, 2000, a new phase of these combined Open Access and Network Architecture Development proceedings was opened to address interim and permanent line sharing issues. The interim phase is to be completed first. The scope and schedule to address final prices and other issues will be set after interim contract language is adopted, with a prehearing conference for the permanent phase noticed within 30 days after interim issues are resolved.

In the February 25 Ruling, CLCs were invited to file a proposed offer on March 1, 2000. Parties were ordered to negotiate diligently and in good faith throughout the month of March to reach agreement on amended contract language for interim line sharing service. All parties were ordered to file on March 27, 2000 either (a) a signed agreement that the CPUC could adopt, or (b) a request for arbitration. A schedule was adopted based on the recommendations of the parties in comments filed pursuant to the January 31, 2000 Ruling.

No signed agreements were filed on March 27, 2000. Rather, consistent with the adopted schedule (as clarified and elaborated upon by Ruling dated March 21, 2000), requests for arbitration with proposed direct testimony were filed and served on March 27, 2000 by Pacific, GTE, Joint Petitioners,[4] Covad Communications Company (Covad), and SBC Advanced Solutions, Inc. (ASI).

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[4] Joint Petitioners are AT&T Communications of California, Inc. (AT&T), FirstWorld Communications, Inc. (FirstWorld), ICG Telecom Group, Inc. (ICG), MCI WorldCom Network Services, Inc. (MCI), New Edge Network, Inc., d/b/a New Edge Networks (New Edge), NorthPoint Communications, Inc. (NorthPoint), Pac-West Telecomm, Inc. (Pac-West), Rhythms Links, Inc. (Rhythms), and Sprint Communications, Inc. Joint Petitioners' position is stated on the Issues Matrix under CLCs' position. MCI is used here even though the most recent pleadings show that MCI WorldCom now refers to itself as WorldCom.

Responses with proposed rebuttal testimony were filed and served on April 5, 2000 by Pacific, GTE, Joint Petitioners, and Covad. In addition, Pacific, GTE, and Covad included marked up, dueling clause contracts. On April 5, 2000, ASI filed and served supplemental direct testimony.

An all parties issues matrix was filed and served on April 6, 2000. An initial arbitration meeting was held on April 7, 2000. The all parties issues matrix was updated on April 10. On April 10, 2000, Joint Petitioners filed and served marked up, dueling clause contracts. Arbitration conferences and arbitration hearings were held from April 11 through April 14, 2000. The all parties issues matrix was updated on April 14, 2000, and again on April 17, 2000.

At the close of hearings, the Arbitrator encouraged parties to continue to try to settle issues. No settlements, however, have been presented.

Opening briefs were filed on April 21, 2000 by Pacific, GTE, Joint Petitioners,[5] AT&T/MCI, Covad, New Edge, and NorthPoint. Reply briefs were filed on April 26, 2000 by Pacific, GTE, Joint Petitioners, AT&T/MCI, Covad, New Edge, NorthPoint, and ASI.

The Draft Arbitrator's Report (DAR) was filed and served on May 8, 2000. A ruling was simultaneously filed and served requiring parties to meet and confer for the purpose of developing a jointly proposed appendix for Pacific, and amendment for GTE, that conformed with the decisions in the DAR, to be filed with comments on the DAR by May 15, 2000. Parties were allowed to submit dueling clauses if they were unable to agree on jointly proposed language that

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[5] Joint Petitioners for the opening and reply briefs are FirstWorld, ICG, New Edge, Pac-West, and Rhythms.

would conform with the decisions in the DAR. The ruling also provided that parties and members of the public could file reply comments by May 17, 2000.

On May 15, 2000, comments were filed and served on the DAR by Pacific, GTE, Joint Petitioners,[6] AT&T/MCI, Covad, New Edge, and NorthPoint. Comments were also filed by the Office of Ratepayer Advocates (ORA), and The Utility Reform Network (TURN).[7] Parties were unable by May 15, 2000 to develop a jointly proposed appendix for Pacific, and amendment for GTE, that conformed to the decisions in the DAR. Parties individually filed proposed appendices and amendments. On May 17, 2000, reply comments were filed by Pacific, GTE, Joint Petitioners, AT&T/MCI, Covad, New Edge, NorthPoint, ORA, and TURN. On May 18, 2000, after consultation with other parties, Pacific filed a conformed Joint xDSL Appendix, and GTE filed a conformed Line Sharing Amendment, with dueling clauses.[8] On May 26, 2000, this, the Final Arbitrator's Report (FAR), was filed and served.

3. Positions of Parties

Attachment A is the April 17, 2000 version of the all parties issues matrix. The issues matrix summarizes the positions of parties. Attachment B identifies modifications to positions based on statements in Opening and Reply Briefs.

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[6] Joint Petitioners for opening comments are FirstWorld, ICG, New Edge, Pac-West, and Rhythms. Joint Petitioners for reply comments are FirstWorld, ICG, Pac-West, and Rhythms.

[7] Any member of the public may file comments on the DAR. (Rule 3.18, Resolution ALJ-178.)

[8] CLCs joining Pacific in the Joint xDSL Appendix are NorthPoint, Covad, Rhythms, and New Edge. Pacific's document includes comments on the dueling clauses. CLCs served a letter on May 18, 2000 with their comments on the dueling clauses.

4. Form of Appendix and Amendment

Proposed amendments are offered by Pacific, GTE, Joint Petitioners, and Covad. After careful consideration, Appendix DSL proposed by Pacific is adopted for amendments or agreements between Pacific and CLCs, and the Line Sharing Amendment proposed by GTE is adopted for amendments between GTE and CLCs.

While any form of amendment could hypothetically be selected from which to begin, the Pacific and GTE amendments are adopted over others proposed in this arbitration for several reasons. First, these amendments are consistent with the FCC's orders, and they are more consistent with the FCC's orders than the alternatives (as explained below in the discussion of issues, e.g., Issues 1 and 2). Moreover, they incorporate results of negotiations and consensus with CLCs, and reflect results that were tested and achieved through the line sharing trials.

Second, of the 38 arbitrated issues, more of the issues resolved below are decided in favor of Pacific and GTE than CLCs or Covad. Thus, the amendments proposed by Pacific and GTE require less changes to conform with the orders in this Report.

Third, the proposed amendments provide CLCs with parity in the service provided by Pacific and GTE to their customers, or to Pacific's affiliate, ASI. This satisfies the parity goal reflected in the Act and FCC orders. The proposals of CLC and Covad exceed the parity requirement in some areas (e.g., Issue 10).

Fourth, with regard to Pacific's proposal, it is an entire line sharing amendment and is capable of being adopted by any CLC, even one without an existing DSL agreement. Only the additional terms pertaining to line sharing need to be adopted for CLCs that have existing DSL agreements with Pacific. This will facilitate reaching conclusion on more agreements, even if it goes beyond the Chief Judge's January 31, 2000 Ruling (which directed only the filing of offers to amend existing ICAs).

Fifth, with regard to GTE's proposal, several parties expressed that they could provision line sharing on June 6, 2000 using GTE's proposal.

Sixth, the CLCs proposed amendment is confusing by its use of unique terms. For example, CLCs use the term "home run copper." This term is not used by the FCC in its Line Sharing Order, nor have the CLCs pointed to any previous use of the term by the CPUC.

Finally, Covad's proposed amendment merits consideration given its focus on only a limited subset of issues. That is, Covad believes 12 issues are critical and must be settled here, with the remaining 26 resolved later. Covad fails to prevail on critical issues within its list of 12, however, and the other 26 issues are decided in this Report. As such, the Covad proposed amendment fails to sufficiently address issues decided here. Rather, the Pacific and GTE proposals are better amendments from which to start.

Joint Petitioners argue that Pacific's amendment cannot be adopted without abrogating existing contractual rights. Joint Petitioners say that Pacific's proposal would revise existing agreements by inserting different and unfavorable language into those agreements. For example, according to Joint Petitioners, Pacific would override Rhythms' existing ICA by adding loop conditioning charges and adding spectrum management provisions.

Pacific resolves this problem by stating that a simple clause may be included. The clause would provide that the line sharing amendment not override provisions in an existing CLC's DSL agreement for proposes of DSL provisioning over stand-alone DSL-capable loops. (Pacific Reply Brief, page 1, footnote 5.) Pacific's proposal is adopted. Pacific's Appendix DSL shall include language in response to this Report to accomplish this proposal.

Joint Petitioners state that this "language does not address the issue of inserting terms that are '*missing*' from existing ICAs," but that Pacific's proposal will result in the addition of new, unfavorable terms (e.g., a spectrum management provision in Rhythm's ICA). (Joint Petitioners' Comments on DAR, dated May 15, 2000, page 6, emphasis in original.) Joint Petitioners contend that this is inconsistent with state law, and is legal error.

To the contrary, Joint Petitioners fail to show that Pacific's language conflicts with the FCC Line Sharing Order (which includes orders regarding spectrum management), or any other FCC order. Further, it is not unreasonable to include provisions in Pacific's Appendix DSL if they are "missing" from a prior ICA, while conforming with FCC orders. Finally, Rhythms joined with other CLCs in providing dueling clauses on May 18, 2000, but no dueling clauses or suggested deletions were included on spectrum management.

Joint Petitioners argue that GTE's proposal is merely an agreement to agree, and is not legally enforceable. To the contrary, as clarified by GTE and as adopted and modified by this Report, it is not simply an agreement to agree. Rather, GTE's amendment reasonably implements the FCC Line Sharing Order and the results of this arbitration, and is legally enforceable.

5. Overview

The goal of this arbitration is to adopt a complete set of prices, terms, and conditions for line sharing that is fair, reasonable, and achievable by June 6, 2000. As a result, the xDSL market will be opened in ways it is not now, and competition will be promoted. At the same time, the adopted amendments must be nondiscriminatory among CLCs, including ASI, and fair to ILECs. They must recognize current systems and technologies, and not assume systems that are not now available or reasonable. To the extent feasible, interim results must not prevent the CPUC from adopting different prices, terms or conditions, as appropriate, in the final phase of this proceeding. Interim results also must not conflict with federal guidelines, rules and regulations as they now exist, or will be decided in the near future.

CLCs argue that interim amendments will be in place for at least one year, and that it is critical to fully implement access to the high frequency portion of the line. They assert that the CPUC is required by both state and federal laws to implement the most complete set of line sharing rules possible. CLCs contend that absent full and aggressive implementation of line sharing, ILECs will unfairly gain market share, and competition will suffer. They point out that the FCC says "states are free to impose additional, pro-competitive requirements consistent with the national framework established in this order." (FCC Line Sharing Order, ¶159.) Further, the FCC says "states may take action to promote our [FCC] overarching policies…" (FCC Line Sharing Order, ¶225.)

The goal here is to implement the most complete set of line sharing rules that is reasonable. A narrow approach in reaching this goal might be to adopt all of the ILECs' recommendations, with the objective of ensuring the market begins on June 6, 2000. A broad approach might be to adopt all of the CLCs' recommendations, with the objective of the most aggressive competition across the full range of technologies. The goal, however, is the most complete set of rules that is reasonable, that will allow successful implementation of xDSL service by ILECs and CLCs via line sharing beginning on June 6, 2000, while promoting the most vigorous and healthy competition to the benefit of ILECs, CLCs and customers.

Good policy requires a balance between the extremes recommended by the parties. It requires a balanced approach to the implementation of line sharing to ensure reasonable fulfillment of the opening of this market. This balanced approach will fully implement what is clear and necessary to open this market to vigorous and healthy competition now, while allowing an orderly process for further refinements and development.

Moreover, a balanced approach will avoid potential conflicts with federal outcomes. The FCC's Line Sharing order seeks "to establish a national framework governing the obligations of incumbent LECs to unbundle the high frequency portion of the loop." (FCC Line Sharing Order, ¶ 223.) To that end, the FCC says:

> "States may enact additional or modified unbundling requirements only to the same extent that we permit the states to modify the unbundling requirements in the *Local Competition Third Report and Order.* [footnote omitted.] Any state that imposes unbundling requirements in contravention of section 253(a) of the Act will be subject to possible preemption by the Commission under section 253(d) of the Act. [footnote omitted.]" (FCC Line Sharing Order, ¶ 223.)

Subsequent preemption by the FCC would be disruptive and undesirable. The results of this interim arbitration must avoid exposure to possible preemption.

The FCC has made some matters very clear in its Line Sharing Order, and others are pending further consideration. A balanced approach in the outcomes of this arbitration will implement what is clear from FCC orders, while awaiting further clarification from the FCC on critical matters (e.g., carriage over fiber, UNE-P[9]), and avoiding complexities that would result from federal preemption.

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[9] UNE-P is "unbundled network element platform." A network element is "a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers,

Footnote continued on next page

At the same time, an expedited implementation of modifications is ordered herein as soon as clarifications are forthcoming from the FCC. This will fully implement existing law, rules and regulations. It will promote the most competition as soon as possible, and it will not foreclose future options to the FCC and CPUC. It will implement market development in an efficient manner, and provide for orderly and expeditious modifications as regulations continue to unfold in this dynamic market. It minimizes the risk of preemption. It balances the positions of the parties to most reasonably and fully implement the law, and provide for vigorous competition.

6. Discussion of Issues

Parties group the issues into four subject areas. This Report follows the same organization:

A. Network Architecture for Line Sharing (Issues 1 – 7),

B. Operational Issues (Issues 8 – 20),

C. Pricing for Line Sharing (Issues 21 – 31), and

D. General Terms and Condition (Issues 32 – 38).

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databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." (47 C.F.R. 51.5.) ILECs must provide CLCs "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules." (47 C.F.R. 51.307.) A platform "refers to combinations of loop, switching and transport unbundled network elements used to provide circuit-switched voice service." (FCC Line Sharing Order, ¶ 72, footnote 161.)

A. Network Architecture for Line Sharing: Issues 1 – 7

6.1. Issue 1: What is Line Sharing?

Pacific and GTE generally propose definitions that match those stated in the FCC Line Sharing Order. CLCs recommend a generally more expansive definition. For example, Pacific and GTE propose a definition that includes line sharing only between a data provider and an ILEC. CLCs propose a definition that encompasses use of the same line by a data provider and any voice provider.

The FCC made clear, however, that ILECs "are not required to provide unbundled access to the high frequency portion of the loop if they are not currently providing analog voice service to the customer." (FCC Line Sharing Order, Executive Summary, page 6.) In fact, the FCC went even further in its adopted regulation:

> "An incumbent LEC shall only provide a requesting carrier with access to the high frequency portion of the loop if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop for which the requesting carrier seeks access." (47 C.F.R. 51.319(h)(3).)

Moreover, Joint Petitioners propose that "both the copper and the fiber portions of the loop in the new fiber-fed DLC configuration should be defined as a line sharing network element…" Further, Joint Petitioners say the CPUC "must include the new fiber-fed DLC technology in line sharing…" (CLC Opening Brief, pages 25-26.)

To the contrary, the FCC Line Sharing Order makes clear that line sharing is on the copper loop facility:

> "The high frequency portion of the loop network element is defined as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions." (47 C.F.R. 51.319(h)(1).)

Treatment of line sharing or transport over fiber is addressed below. (Issue 3.) A simple, straightforward, direct, and clear reading of the FCC Line Sharing Order supports the ILECs' proposed definitions. Therefore, the ILECs' proposed definitions are adopted.

6.2. Issue 2: What is the High Bandwidth Line Sharing Unbundled Network Element?

Pacific and GTE propose definitions that generally match those of the FCC. CLCs propose a definition that includes the fiber portion of the local loop. CLCs argue that "from the customer's prospective, the composition of the loop does not matter." (CLC Opening Brief, page 29.) Further, CLCs say:

> "The ILECs should not be allowed to use regulatory definitions as a means to preclude CLCs from serving an entire group of customers, especially as they move aggressively to upgrade their copper loops to fiber-fed DLC configurations that support DSL services." (CLC Opening Brief, page 30.)

For the same reasons as stated above regarding Issue 1, the ILECs definition is adopted. Carriage over fiber is discussed further below in Issue 3.

6.3. Issue 3: Must ILEC allow CLCs to use line sharing on loops that traverse fiber-fed digital loop carrier ("DLC") systems, including loops deployed by Pacific under its Project Pronto, as a result of this proceeding?

ILECs say no, while CLCs say yes.

ILECs are correct that line sharing pursuant to the FCC Line Sharing Order is on the copper loop. (47 C.F.R. 51.319(h)(1).) In fact, the FCC specifically says: "fiber-based transmission systems are not considered in this Order, except if specifically noted otherwise." (FCC Line Sharing Order, ¶17, footnote 27.) CLCs argue that the Act and FCC orders should be read to require line sharing on fiber portions of the loop now. CLCs, however, point to no specific language in the FCC Line Sharing Order that clearly and directly states line sharing over fiber is the FCC's requirement or rule, and none is apparent. Therefore, at least initially, the ILECs will not be required as a result of this arbitration to allow CLCs to line share on the fiber portion of local loops that include fiber-fed DLC systems.

At the same time, Pacific says it will provide transport of CLCs' digital signals over fiber from the remote terminal to the central office, but as a separate wholesale service. This may or may not satisfactorily resolve the matter. Pacific provided a proposed, preliminary agreement with its response to CLCs' requests for arbitration (attached to Pacific's Response as Appendix Digital Loop Electronics - Digital Subscriber Line, or Appendix DLE-DSL). Pacific states, however, that it has not had sufficient time to develop costs and prices related to the offering. Further, Pacific contends that these voluntary broadband UNEs are separate and apart from the line sharing ordered by the FCC, making it inappropriate and premature to litigate the rates, terms, and conditions in this arbitration. Pacific is correct only in part.

CLCs show that as of April 12, 2000, Pacific plans to install fiber-fed DLC systems throughout California from May 2000 through the end of September 2000 (i.e., third quarter 2000). (Exhibit 22.) There is no doubt that Pacific is seeking to implement Project Pronto[10] as soon as possible, even if the specific installation dates might get delayed. Therefore, it is possible that widespread deployment of fiber within the local loop may occur in Pacific's area before the permanent part of the line sharing phase of this proceeding is concluded.

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[10] Project Pronto is an initiative of SBC Communications, Inc. (SBC-the corporate parent of Pacific). It "is designed to transform SBC into a broadband service provider capable of meeting all customers' needs for data, voice and video products. SBC plans to invest more than $6 billion…to create a robust, comprehensive, data-centric broadband network architecture." (Exhibit 52, Attachment B, page 1.)

Moreover, assuming Pacific intends to install fiber with Project Pronto but not leave it idle, Pacific plans to carry the xDSL traffic of its customers, or those of ASI, over the fiber portion of the DLC. Therefore, it must be technically feasible. Pacific does not argue it is not technically feasible. Non-discriminatory treatment and parity for competitors requires this issue be considered without delay.

CLCs are essentially right that from the customer's prospective, the composition of the loop does not matter, and ILECs should not be allowed to use regulatory definitions to preclude CLCs from serving an entire group of customers. (CLC Opening Brief, pages 29 and 30.) At the same time, several issues may need further consideration regarding transport and line sharing over fiber, including the prices, terms, and conditions. This subject cannot wait until the permanent part of the line sharing phase of this proceeding. The FCC says that "states are free to impose additional, pro-competitive requirements consistent with the national framework established in this order." (FCC Line Sharing Order, ¶ 159.)

Therefore, Pacific should complete its Appendix DLE-DSL, including prices, within 30 days of the date of the FAR. Pacific should file and serve Appendix DLE-DSL in this proceeding. If jointly acceptable to Pacific and a CLC, they may execute Appendix DLE-DSL, and it will be approved consistent with Rule 6 of Resolution ALJ-178 (e.g., approved without Commission resolution 30 days from the date the advice letter is filed, unless suspended or rejected by the Commission). Moreover, CLCs may use Appendix DLE-DSL for the basis of negotiation, mediation, or arbitration under the Act and CPUC Resolution ALJ-178.

The same is essentially true for GTE. While GTE has no immediate plans to roll out this technology on a widespread basis, CLCs show that GTE is seeking to begin initial deployment in California in the fourth quarter of 2000.

(Reporter's Transcript at 535: 18-23.) Therefore, it is possible that widespread deployment of fiber within the local loop may also occur in at least some of GTE's area before the permanent part of the line sharing phase of this proceeding is concluded.

Thus, GTE should develop its own proposed Appendix DLE-DSL, or an equivalent, including prices. Since GTE's initial deployment is not scheduled until the end of 2000, GTE should have more time to develop its appendix, thereby taking advantage of the lessons learned from Pacific and CLCs on Pacific's Appendix DLE-DSL. GTE should file and serve its proposed Appendix DLE-DSL within 90 days of the date of the FAR.

CLCs argue that parity demands ILECs enable CLCs to line share over fiber DLC systems. Any other course, according to CLCs, will result in ILECs creating a new monopoly in provisioning advanced services to end-user customers. CLCs are right in part. Even when Project Pronto is fully deployed, copper lines will still continue to serve customers up to 12,000 feet (2.27 miles) from the central office. (Exhibit 52, Attachment B, page 3.) Some, if not many, customers are within this range. Further, Project Pronto will not remove the existing copper lines. Those lines will still be available for use by CLCs. The same is likely to be true for GTE's deployment of fiber.[11]

Nonetheless, CLCs are right that the Act and FCC orders seek to open markets, promote competition, require ILECs to offer nondiscriminatory access and prices to CLCs for unbundled network elements, and require parity between

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[11] According to the FCC: "When an incumbent LEC upgrades its loop plant from copper to fiber, the incumbent LEC rarely removes the existing copper, but instead lays the fiber along the existing copper routes." (FCC Line Sharing Order, ¶ 80.)

competitors. At the same time, the FCC is giving further consideration to the matter of line sharing over fiber. As such, this arbitration should provide a mechanism to take advantage of any further consideration by the FCC without undue delay.

In particular, SBC has asked the FCC to address two important issues regarding Project Pronto that affect competitive access and carriage of CLC traffic over fiber.[12] The CPUC provided its opinion by letter dated April 20, 2000. The FCC has not yet announced a decision.

Thus, while the FCC Line Sharing Order does not require line sharing over a local loop that includes fiber, it is clearly an issue, and has been brought to the FCC's attention. If the FCC orders line sharing or transport over fiber before the final part of the line sharing phase of this proceeding, it would be unreasonable to delay implementation of an FCC order requiring line sharing over fiber.

Therefore, should the FCC rule in favor of the position taken by CLCs in this arbitration, ILECs are required to comply without delay with any FCC order that directs line sharing or transport over fiber. That is, ILECs will further amend the DSL appendix and amendment adopted herein to provide for line sharing or transport over fiber without delay consistent with any FCC order. The further appendix or amendment shall be available to any CLC to execute and become effective under Rule 6 of Resolution ALJ-178. ILECs, however, are not required by the outcome of this arbitration to implement the exact language

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[12] Letter dated February 15, 2000, from Paul K. Mancini, Vice-President and Assistant General Counsel, SBC, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, in CC Docket No. 98-141. Specifically, SBC asks the FCC for resolution of issues regarding ownership and/or unbundled network access to (1) combination plugs/cards in remote terminals, and (2) optical concentration devices located in the ILEC central office.

proposed here by CLCs on this issue, or to respond to the FCC order other than without delay, since the final scope, timing and effective date of an FCC order is not sufficiently known at this time.

Moreover, it would be unreasonable even in the interim to allow ILECs to serve their customers (or those of a corporate affiliate) over fiber and not allow CLCs the same option. Therefore, no less than 30 days before the first day that an ILEC carries xDSL service over the fiber portion of the local loop for any of its own customers (or any customer of a corporate affiliate), that ILEC shall amend the DSL appendix or amendment adopted herein. The appendix or amendment shall provide for transport of a CLC's DSL traffic under the same terms, conditions, and prices as provided by the ILEC to itself, or a corporate affiliate. Transport shall begin simultaneously with, or after, the first day of service by the ILEC to its own customer, or that of a corporate affiliate, at the CLC's option.[13] The prices shall be subject to true-up during the final part of the line sharing phase of this proceeding. In addition, this requirement is subject to subsequent FCC orders, and ILEC transport of CLC traffic over fiber must conform with those orders.

Pacific says it would prefer not to finalize Appendix DLE-DSL until the FCC rules on its request regarding Project Pronto (i.e., to clarify ownership and access to plugs/cards in remote terminals, and optical concentration devices in

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[13] Pacific clarifies in comments on the DAR that no carrier, including Pacific's advanced services affiliate, will be given advance access to the fiber portion of the local loop. Rather, they will all have access at the same time. Joint Petitioners point out that as proposed in the DAR, however, Pacific would have a 30 day advantage in the provision of xDSL service to its own customers. The requirement, therefore, is modified in this FAR such that service shall begin to all entities, including to Pacific and GTE themselves, at the same time.

the central office). Rather, Pacific asks that it not be required to complete Appendix DLE-DSL until 30 days after the FCC makes its ruling. According to Pacific, this will be efficient, and will avoid uncertainty, additional costs, and delays. Pacific says it cannot implement broadband services for itself, its affiliates or for CLCs, until the questions are decided at the FCC.

Pacific's request is not adopted. The merits of Pacific completing Appendix DLE-DSL so that Pacific, CLCs, other ILECs, the FCC, and CPUC can make further progress on this issue outweigh the additional burdens on Pacific. Among other things, Appendix DLE-DSL may be used for negotiation, mediation or arbitration under the Act. This will allow these matters to be resolved in a timely manner, with implementation available concurrently with initiation of the new fiber technology.

Moreover, as provided herein, Appendix DLE-DSL does not become effective unless agreed to by Pacific (except subject to an FCC order directing line sharing or transport over fiber, or service to their own customers). Thus, Pacific need not be concerned about complications, since it can decline to agree to Appendix DLE-DSL until those matters are resolved.

Further, Pacific's proposed Appendix DLE-DSL already contains provisions that make it subject to change based on further orders of the FCC or CPUC (e.g., Section 17.2). The underlying ICAs that Appendix DLE-DSL appends most likely also contain similar language. If neither the language in Appendix DLE-DSL nor the underlying ICA are adequate, however, Pacific may propose additional language that makes clear the appendix is subject to the FCC's decisions on Pacific's request regarding Project Pronto.

The same factors are similarly true for GTE. Thus, Pacific should complete Appendix DLE-DSL within 30 days, and GTE should complete an equivalent appendix or amendment within 90 days, of the date of the FAR.

6.4. Issue 4: Should the CLC or ILEC own the splitter needed for line sharing, and where should the splitter be located?

Pacific asserts it is not obligated to own splitters, but has voluntarily agreed to do so as an option for CLCs. Pacific will offer splitters a line at a time subject to certain rates, terms, and conditions. According to Pacific, the owner of the splitter will determine where it is located.

GTE says it has reached agreement with CLCs on an initial deployment of GTE-owned splitters. According to GTE, splitters may be located in the CLC collocation area or GTE's central office area. GTE asserts it is not reasonable to expect GTE to make an extensive menu of splitter options available by June 6, 2000.

CLCs say ILECs should be required to offer a menu of options for splitter ownership and placement. According to CLCs, CLCs should be able to choose from three options on a central office by central office basis: (1) CLC purchases and owns the splitter and places it in the CLC's collocation area; (2) CLC purchases and owns the splitter, or specifies the splitter for the ILEC to obtain, and chooses to have the splitter placed in a common area in the ILEC service wire center to which the CLC has access; and (3) ILEC owns and obtains the splitter and locates it in an area in the serving wire center to which the CLC does not have access.

CLCs seek a menu of choices to provide flexibility. According to CLCs, only with such flexibility will each CLC be able to implement its own business plan to provide advanced services to California customers on a widespread basis.

While a menu of choices may be optimal from the point of view of CLCs, it is neither required by the FCC, nor is it reasonable. The FCC allows, but does not require, ILECs to own splitters:

> "We conclude that, subject to certain obligations, incumbent LECs may maintain control over the loop and splitter equipment and functions. In fact, both the incumbents and the competitive LECs agree that subject to certain obligations, the incumbent LEC may maintain control over the loop and the splitter functionality if desired. [footnote omitted.]" (FCC Line Sharing Order, ¶ 76, emphasis added.)

That is, ILEC control is discretionary, not mandatory.

The FCC notes that both ILECs and CLCs argue reasonably for the right to control the splitter. The FCC allows either to own the splitter, but does not order that either must own the splitter. If the ILEC owns the splitter, however, certain obligations apply, as specified in the FCC's adopted regulation:

> "In situations where a requesting carrier is obtaining access to the high frequency portion of the loop, the incumbent LEC may maintain control over the loop and splitter equipment and functions, and shall provide to requesting carriers loop and splitter functionality that is compatible with any transmission technology that the requesting carrier seeks to deploy using the high frequency portion of the loop, as defined in this subsection, provided that such transmission technology is presumed to be deployable pursuant to section 51.230." (47 C.F.R. 51.319(h)(4).)

Thus, the ILEC is not required to own the splitter. If, however, the ILEC elects to own the splitter, it must provide the CLC with loop and splitter functionality that is compatible with the transmission technology the CLC seeks to deploy. To that extent, if the ILEC voluntarily provides the splitter, the CLC may dictate the functionality that the ILEC must provide.

Pacific argues that it must have the right to choose the splitter it will purchase. Pacific is right to the extent that Pacific may determine the splitter manufacturer, vendor, and nearly all factors relative to the purchase. Consistent with the FCC's regulations, however, Pacific must provide splitter functionality that is compatible with any transmission technology that the requesting carrier seeks to deploy.

The CLC, however, may not dictate the location of the splitter owned by the ILEC. Nothing in the FCC Line Sharing Order suggests or directs that the CLC may dictate the location of an ILEC-owned splitter. Rather, ILECs must be allowed to manage the use of their own facilities to ensure that they are used efficiently and in a safe manner. For example, placing the splitter on the main distribution frame, as suggested by the CLCs, is an inefficient use of space, according to Pacific. Pacific must be allowed to make that determination regarding its own space.

The Court of Appeals for the DC Circuit recently considered an FCC rule that required ILECs to give competitors the option of collocating equipment in any unused space within the incumbent's premises, to the extent technically feasible. In vacating the FCC's rule, the Court stated:

> "'The FCC offers no good reason to explain why a competitor, as opposed to the LEC, should choose where to establish collocation on the LEC's property; nor is there any good explanation of why LECs are forbidden from requiring competitors to use separate entrances to access their own equipment; nor is there any reasonable justification for the rule prohibiting LECs from requiring competitors to use separate or isolated rooms or floors. It is one thing to say that LECs are forbidden from imposing unreasonable minimum space requirements on competitors; <u>it is quite another thing, however, to say that competitors, over the objection of LEC property owners, are free to pick and choose preferred space on the</u>

LECs' premises, subject to only technical feasibility. There is nothing in § 251(c)(6) that endorses this approach.'"[14]

The CLCs request that the CPUC go beyond what the Court has concluded the FCC could not do in its collocation order (i.e., here asking that the CPUC direct both the type of splitter and the location in the ILEC's area). The CLCs request is unreasonable.

Pacific proposes voluntary ownership of splitters subject to rates, terms, and conditions. Among the conditions is that CLCs must provide a forecast of demand by central office, subject to penalties if the CLC fails to come within plus or minus 25% of its forecast.[15] CLCs object to Pacific's penalty provision. CLCs are right.

While Pacific may decide whether or not it will provide splitters, if it does so, it may not require unreasonable conditions. Rather, Pacific may either elect not to own and lease splitters, or it may own and lease splitters on reasonable terms and conditions as determined through this arbitration.

Pacific's penalty provision is unreasonable for several reasons. First, it is tied to the "difference between the ports actually used and the ports forecasted."

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[14] Pacific Opening Brief, page 21, citing GTE Services Corporation et al. v. Federal Communications Commission et al., 205 F. 3d 416, 426 (D.C. Cir. 2000) (emphasis added by Pacific).

[15] Section 5.1.2.1.2 of Pacific's proposed Appendix DSL states: "Forecast Penalties: If CLEC fails to come within plus or minus twenty five percent (25%) of its forecast referenced in Section 5.1.2.4.1 above, CLEC shall have an additional ninety (90) days to meet such forecast. If, on the 90th day, CLEC has failed to come within plus or minus twenty five percent (25%) of its forecast referenced in Section 5.1.2.4.1 above, CLEC shall pay SBC a penalty payment commesurate [sic] with the difference between the ports actually used and the ports forecasted as a nonrecurring charge. Should another carrier consume the splitter ports which were forecasted but not used by CLEC, SBC will discount CLEC's penalty payment to SBC on a pro rata basis."

(Section 5.1.2.1.2.) The penalty might be equal to the difference in cost between the ports used and forecast, but as written it is not clear.

Second, Pacific asserts it seeks to apply this penalty to prevent overforecasting. Should that occur, Pacific is concerned that it will be left with an expensive inventory of unused splitters, and must take the risk of technological change on that unused inventory. To the contrary, Pacific fails to show that it cannot return unused splitters to vendors for a refund, market excess splitters to others, or secure other relief. GTE faces the same risk but does not seek to protect itself by a penalty provision. Pacific fails to make a convincing showing that its risk merits different treatment than sought by GTE.

Third, Pacific also asserts it seeks to apply this penalty to prevent underforecasting. Pacific says it seeks to balance the incentive in order to promote good forecasts, and to minimize its risk that a CLC will seek compensation from Pacific for failing to provide facilities timely. Pacific's showing, however, fails to compellingly demonstrate that a balanced penalty will do anything to promote good forecasts.[16] Rather, CLCs will suffer from underforecasting by a failure to meet customer demand. There is nothing that shows an additional penalty by Pacific will change the CLCs' incentive not to underforecast. Similarly, CLCs repeatedly argue here that forecasts should be non-binding. That requirement should apply to both CLCs and ILECs, and will be adopted. As such, Pacific will not face liability from failure to provision facilities if the cause is simply its reliance on a non-binding forecast.

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[16] A compelling showing here, and as used elsewhere in this Report, means one that on balance demonstrates the party's position is more likely than not to be correct.

Fourth, a CLC's ability to accurately forecast is integrally related to the ILEC's ability to process orders and provision loops on time. If an ILEC is unable to process orders and provision loops on time, the CLC may not be able to meet its forecasts, particularly if the CLC's customers become upset and cancel orders. The ILEC shares responsibility with the CLC for not meeting its forecasts in such cases. It is unreasonable to penalize the CLC in these circumstances.

Finally, Pacific's penalty applies a line-at-a-time, and misforecasts by one CLC may be offset by forecasts of another CLC. That is, Pacific proposes its penalty provision be applied collectively. If the CLC fails to come within 25% of its forecast, but another CLC uses the splitter, the first CLC would not pay a penalty. This does not, however, cure the negative effects of the penalty.

Once aggregated, it is just as likely as not that misforecasts will offset each other. Pacific fails to convincingly show that the aggregate of forecasts is more likely to be skewed in one direction than offsetting. The negative chilling and punishment effects of penalty provisions outweigh any positive benefits, making the term unreasonable. Pacific shall delete Section 5.1.2.1.2 from Appendix DSL.

In comments on the DAR, GTE announces that GTE has added a clause to its proposed amendment reflecting the ruling in the DAR that ILEC ownership of splitters is voluntary. GTE says this clause does not diminish or change GTE's commitment to install splitters in all central offices requested by CLCs to meet CLCs' initial deployment needs. Rather, according to GTE, its "proposed language gives GTE the opportunity to provide CLCs with six months' notice to elect to discontinue future use of the ILEC-owned splitter option." (GTE Comments on DAR, page 6.) GTE says splitters already in place will remain. CLCs oppose GTE's last minute proposal, and the parties submit dueling clauses on this issue.

GTE's proposed dueling clause language is rejected. GTE's proposed language says "GTE shall discontinue [ILEC-owned splitters] on the earlier date to occur of December 15, 2000 or the termination of this Agreement…" (Section 2.3.) This is not consistent with GTE's characterization that the language gives GTE the "opportunity" to provide CLCs with notice. GTE included a GTE-owned splitter option in its originally proposed amendment. (See Exhibit 3 to GTE's request for arbitration, Section 2.3(b).) It is unreasonable for GTE to now withdraw that option. The Ruling requiring parties to propose an amendment to conform with the decisions in the DAR did not invite ILECs to reduce what they had previously offered. Moreover, even without this clause, it is possible that GTE's amendment may allow GTE to discontinue future provision of GTE-owned splitters after reasonable notice. If GTE makes a decision regarding this and a CLC disagrees, parties should use the dispute resolution provisions in the ICA to resolve the matter.

6.5. <u>Issue 5</u>: If the ILEC owns the splitter, should it provide splitter functionality to CLCs on a line-at-a-time, card-at-a-time, and/or shelf at-a-time basis?

Pacific is willing to provide Pacific-owned splitters a line-at-a-time. GTE will provide common or shared port-by-port and card / bays, and will take dedicated arrangements under advisement.

CLCs initially contended ILECs should be required to offer the CLCs all three options. In its Opening Brief, CLCs eliminate the card-at-a-time option for the interim. In its Reply Brief, New Edge recommends deferral of the shelf-at-a-time option to later. Other CLCs still seek all options.

There is consensus that the line-at-a-time option is feasible and desirable. Adopted amendments shall contain this option.

Parties dispute the desirability, efficiency, and feasibility of other options. Pacific contends its inventory system simply does not allow it to offer splitters both a line-at-a-time and a shelf-at-a-time. Pacific says Telcordia (the creator of Pacific's inventory system) cannot begin to modify Pacific's inventory system until at least November 2000, at an unknown cost and time to completion. GTE states that it does not have systems in place to support the dedicated shelf option, and that there are several problems with the shelf option (e.g., inventory problems, interruption of voice service when a customer switches from one CLC to another, ILEC cost). Parties dispute which option is most efficient with respect to cable prewiring and jumper installation. NorthPoint in particular argues for shelf at a time. Advocates for all three options say that the range of options will facilitate rapid deployment of line sharing.

The desirability of rapid deployment of line sharing must be balanced with cost and feasibility. On balance, it is reasonable here to adopt line-at-a-time, but not card-at-a-time, or shelf-at-a-time. On the other hand, ILECs may offer ILEC-provided card-at-a-time and shelf-at-a-time if and when they wish and are able, but are not required to do so as a result of this arbitration.

Regarding shelf-at-a-time, GTE proposes that NorthPoint provide dedicated splitters by owning them itself. As explained by GTE, this would be done by virtual collocation. Under this option, a CLC would purchase the splitter and lease it to GTE for $1.00. GTE would install and maintain the splitter shelf, reserving it for the CLC's use. The CLC would be responsible for tracking available splitter capacity and augmenting that capacity when needed. GTE would be relieved of inventory problems that would result from requiring GTE to maintain the splitter stock. According to GTE, this is the most efficient approach to the dedicated shelf option at this time. Further, this approach allows prewiring and pretesting of the splitter-DSLAM connection, as well as all of the dedicated shelf benefits asserted by NorthPoint.

No party says that this approach would not work for any CLC desiring the shelf-at-a-time option. Neither NorthPoint nor any CLC allege any problems with this scheme. This option is adopted for GTE.

No party presents any reasons why this approach of a CLC-owned shelf leased to the ILEC with virtual collocation will not also work for Pacific. Therefore, Pacific shall also make this option available for CLCs.

New Edge argues that Pacific will not be able to meet the June 6, 2000 deadline of providing ILEC-owned splitters to requesting CLCs in all central offices. Because of this, New Edge says that the CPUC should require Pacific to provide the full menu of options for CLCs. To the contrary, Pacific is not required to provide ILEC-owned splitters in every central office by June 6, 2000. Therefore, New Edge's remedy is not appropriate, and is not adopted.

6.6. Issue 6: If an end user discontinues the ILEC as its voice provider but continues to receive service from a CLC data provider, must the ILEC continue to provide line sharing between the data provider and the third-party voice provider?

ILECs say no, and that the CLC data provider must purchase the entire loop if it wishes to continue to serve the customer. CLCs say yes, since the end-user discontinuing its ILEC voice service does nothing to undermine the ILEC's ability to provide the data portion of the loop. Rather, according to CLCs, the only reason the ILEC would stop providing line sharing is to harm competition.

The ILECs' position is adopted. The FCC Line Sharing Order is clear on this point:

> "…line sharing contemplates that the incumbent LEC continues to provide POTS [plain old telephone service] services on the lower frequencies while another carrier provides data services

> on higher frequencies. The record does not support extending line sharing requirements to loops that do not meet the prerequisite condition that an incumbent LEC be providing voiceband service on that loop for a competitive LEC to obtain access to the high frequency portion. Accordingly, we conclude that incumbent LECs must make available to competitive carriers only the high frequency portion of the loop network element on loops on which the incumbent LEC is also providing analog voice service (often referred to as a "wet loop"). We note that in the event that the customer terminates its incumbent LEC provided voice service, for whatever reason, the competitive data LEC is required to purchase the full stand-alone loop network element if it wishes to continue providing xDSL service." (FCC Line Sharing Order, ¶ 72, footnotes omitted.)

Similarly, FCC's adopted regulation states that:

> "An incumbent LEC shall only provide a requesting carrier with access to the high frequency portion of the loop if the incumbent LEC is providing, <u>and continues to provide</u>, analog circuit-switched voiceband services on the particular loop for which the requesting carrier seeks access." (47 C.F.R. 51.319(h)(3); emphasis added.)

That is, if the end-user discontinues the ILEC as its voice provider, the CLC must purchase the full stand-alone loop UNE if it wishes to continue providing xDSL service.

The FCC reinforces this point by saying that this is the case not only when a customer discontinues voice service, but also when the ILEC disconnects the customer for nonpayment. In both cases, the CLC must purchase the entire unbundled loop. The only limitation is that the ILEC must not cause or require an interruption in the CLC's data service:

> "GTE requests that we clarify that an incumbent carrier can disconnect a shared line if a customer does not pay its local voice telephone bill. If the incumbent carrier has disconnected

> the customer's voice service in compliance with applicable federal, state and local law, then there is no longer an incumbent voiceband service with which the competitive LEC can share the loop. The same holds true if the customer voluntarily cancels incumbent LEC provided voiceband services on the shared loop. In those situations, in order to continue to provide data services to that customer, the competitive LEC must purchase the entire unbundled loop and must pay the incumbent LEC the forward looking cost for that unbundled network element. We would find it unacceptable, and potentially discriminatory under section 201 or a violation of section 251 obligations, however, for the incumbent to cause or require any interruption of the competitive LEC's service in order to execute such a loop access status change." (FCC Line Sharing Order, ¶ 73, footnotes omitted.)

Therefore, the ILEC position is adopted, subject to the limitation on service interruption condition. That is, if the ICAs which the line sharing appendices append, or amendments amend, do not now make clear that service may not be interrupted in such cases, parties shall include contract language in the appendices and amendments to make that clear.

Pacific says that removal of a Pacific-owned splitter to convert the customer to a stand-alone loop will necessarily create a momentary outage of the CLC's data service. Pacific is concerned the ruling here is that this momentary outage is unacceptable. Pacific says it needs the ability to disconnect its splitter in order to convert the line, and to make the valuable splitter available for another line sharing CLC. CLCs say it is unclear what Pacific means by "momentary," but that any such outage should be less than one minute.

Pacific is right. Pacific is authorized to interrupt service to convert the line and recover the splitter, as long as the outage is momentary (e.g., less than one minute, or as defined by the FCC), and the outage does not conflict with any FCC decision, rule, or regulation. If there is a conflict with any FCC order, Pacific must seek relief from the FCC.

6.7. Issue 7: Must ILEC provide access to the HFS portion of the loop as part of UNE-P, as a result of this proceeding?

ILECs say no, and point out that the matter is under further consideration at the FCC. ILECs recommend waiting until the FCC makes its ruling.

CLCs in general, and AT&T and MCI in particular, say yes. CLCs point out that providing access over the UNE-P is technically and operationally feasible. CLCs argue that requiring ILECs to provide line sharing as part of the UNE-P is one of the key ways to ensure that the advanced services market is open to widespread competition.

This arbitration will not result in an order that ILECs immediately provide access to the high frequency portion of the loop as part of a UNE-P. The FCC Line Sharing Order is clear that ILECs have no line sharing obligation when they are not the voice provider, and that line sharing does not apply to a UNE-P.

> "The record does not support extending line sharing requirements to loops that do not meet the prerequisite condition that an incumbent LEC be providing voiceband service on that loop…Similarly, incumbent carriers are not required to provide line sharing to requesting carriers that are purchasing a combination of network elements known as the platform. [footnote omitted.] In that circumstance, the incumbent no longer is the voice provider to the customer." (FCC Line Sharing Order, ¶ 72.)

AT&T and MCI have petitioned the FCC for expedited clarification or reconsideration of this matter.[17] The FCC has not yet announced its decision.

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[17] See, e.g., Petition of AT&T Corp. for Expedited Clarification or, in the Alternative, for Reconsideration, CC Dkt. Nos. 96-98, 98-147, dated Feb, 9, 2000; Petition for

Footnote continued on next page

It would be unwise to reach a decision here that is contrary to the clear direction in the FCC Line Sharing Order, particularly when the matter is pending further consideration at the FCC. At the same time, it would be unwise to fail to provide for a quick response to incorporate ILECs' provision of access to the high frequency portion of the loop as part of a UNE-P if the FCC rules in favor of AT&T and MCI. Therefore, Pacific and GTE shall modify their xDSL appendices or amendments without delay to comply with any FCC order requiring ILECs to provision access to the high frequency portion of the loop as part of a UNE-P.

AT&T and MCI argue that both the Act and the FCC's implementing rules require ILECs to provide nondiscriminatory access to the local loop, including all of the features, functions, and capabilities of the loop. AT&T and MCI contend that the ILECs' refusal to permit AT&T and MCI the same efficiencies over the UNE-P loop as the ILECs enjoy with data CLCs is a violation of Sections 201 and 251 of the Act. AT&T and MCI argue that the CPUC need not go beyond existing law to find that ILECs are obligated to permit UNE-P CLCs to use the full functionality of the loop they have purchased, and that it should be ordered in this arbitration consistent with current law.

By requiring access to the high frequency portion of the loop as part of a UNE-P, AT&T and MCI seek the ability to win a voice customer from an ILEC, and easily migrate the voice customer from the ILEC to either AT&T or MCI

Clarification of MCI WorldCom, CC Dkt. Nos. 96-98, 98-147, dated Feb. 9, 2000; Comments of GTE, CC Dkt. Nos. 96-98, 98-147, dated March 22, 2000; Bell Atlantic's Opposition to AT&T and MCI's Petitions for Clarification, or in the alternative, Reconsideration, CC Dkt. Nos. 96-98, 98-147; Reply of AT&T Corp. to Responses to Petitions for Clarification and Reconsideration, CC Dkt. Nos. 96-98, 98-147, dated April 5, 2000; Reply Comments of MCI WorldCom, Inc., CC Dkt. Nos. 96-98, 98-147, dated April 5, 2000. (GTE's Opening Brief, page 28, footnote 9.)

while the customer's data CLC remains the same. This requires the ILEC to own the splitter, however, with the splitter part of the loop, and provisioned as part of the UNE or UNE-P. Otherwise, the CLC must own the splitter, and the ILECs require a reconfiguration of the network architecture at a cost and disruption to the CLC and its customer, according to AT&T and MCI.[18]

AT&T and MCI make an interesting argument regarding this option. They point out that this option presents no technical or operational difficulties. In contrast, Pacific and GTE explain that provisioning, billing, testing, facilitating customer care, keeping track of data CLCs authorized to share the UNE-P, and maintaining reasonable customer security between three companies all present a layer of complexity not envisioned in the FCC Line Sharing Order. In fact, the FCC Order states:

> "It is clear from the record that the complexities involved with implementing line sharing dramatically increase where more than two service providers share a single loop. [footnote omitted.] We believe that serving multiple customers would be very costly, time consuming, and would lead to complex operational difficulties. Moreover, the record does not sufficiently support the establishment of multiple customer line sharing requirements." (FCC Line Sharing Order, ¶ 74.)

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18 "Likewise, carriers using the UNE-P must be in a position to migrate customers who already subscribe to advanced service and local voice service to UNE-P without undue disruption of the customer's ability to use both voice and advanced services." (AT&T/MCI Opening Brief, page 3.) "…ILEC voice customers receiving bundled service via an ILEC/CLC line sharing arrangement (in which the ILEC owns the splitter) cannot migrate to AT&T and MCI WorldCom in a prompt, efficient, and nondisruptive manner. Instead, Pacific Bell intends to disconnect the working loop, remove the splitter, and force either AT&T or MCI WorldCom to reconfigure the service by reassembling a new loop and re-inserting their own splitter." (AT&T/MCI Opening Brief, page 19.)

AT&T and MCI agree to waive their requested contract language regarding ordering and billing requirements to third parties for up to six months to facilitate their requested option. (AT&T/MCI Opening Brief, page 16.) This partial waiver, however, does not sufficiently resolve questions regarding the added complexities. Rather, it only defers them for a limited amount of time, without adequate indication or assurance that they can be resolved during that time.

The fundamental question is whether an ILEC-owned splitter is part of the loop, and provisioned with a UNE-P loop. It is clear from the FCC Line Sharing Order that ILECs need not own a splitter. (See Issue 4.) It is difficult to see how a splitter is part of the loop if an ILEC is not required to own a splitter.

GTE points out that an ILEC is under no obligation to purchase, maintain, and install an upgrade to its existing network to accommodate a CLC's request for interconnection or UNEs. In support, GTE cites the Eighth Circuit, saying: "access to UNEs requires access only to the incumbent's 'existing network--not to a yet unbuilt superior one.'" (GTE Opening Brief, page 36, citing Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) at 813; emphasis in original.) ILECs are not required to own splitters. (See Issue 4.) Further, ILECs are not required to install splitters to accommodate a CLC's request for interconnection to the high frequency portion of the local loop UNE when the splitter is not part of the existing system, but is part of a yet unbuilt superior system.

At the same time, introducing fiber-fed DLCs into the local loop may result in a splitter being part of many customers' local loop, since a splitter must be in the remote terminal. The role of the splitter, and whether it is a UNE, or part of a local loop, may change over time. There is insufficient record and argument here, however, to conclude that the splitter is part of the UNE-P, or local loop, at this time.[19]

Moreover, AT&T and MCI are in no way now foreclosed from partnering with a data CLC and jointly providing voice and data over a UNE. In that case, one of the CLCs will own the splitter (either AT&T, MCI or the data CLC).

AT&T and MCI argue that they have explored the use of resale, and conclude it is simply not a viable alternative for long-term broad-based market coverage. They assert that UNE loops (as opposed to UNE-P) may serve as a near-term entry strategy, but only in very specific applications for large business customers. As a result, AT&T/MCI conclude that only the UNE-P is viable for ubiquitous, mass-market residential offerings of xDSL service. (AT&T/MCI Opening Brief, page 5.)

This is a matter of economics. Assuming AT&T and MCI are right, and assuming away the legal issues, the record here is not sufficient to conclude that the economic benefits of ordering ILECs to provide access to the high frequency portion of the loop as part of UNE-P outweigh the costs.

AT&T/MCI ask that Pacific and GTE be required to incorporate the AT&T/MCI proposed contract language upon issuance of any FCC order that allows provisioning the high frequency portion of the UNE-P loop. This will not be adopted. The FCC order may or may not adopt the same terms and conditions that are in the AT&T/MCI proposed language. It would be

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[19] AT&T and MCI argue that the splitter is part of the loop, and "an ancillary piece of loop electronics." (AT&T/MCI Opening Brief, page 5.) Whether or not it is a piece of electronic equipment is debated in this record, as is whether or not it is ancillary. AT&T and MCI fail to carry their burden here that the splitter is ancillary or a piece of electronic equipment. A more complete record would be needed to reach those conclusions.

premature, and prejudge the nature, scope and compliance timeframe of an FCC order, to direct Pacific and GTE to insert the language proposed by AT&T/MCI in this arbitration upon later issuance of an FCC order. Ordering compliance with specific contract language in advance would only invite further conflict and delay in the event the FCC order conflicts with the AT&T/MCI language proposed here.

Further, AT&T/MCI request that a specific compliance deadline be included (e.g., 30 days). AT&T/MCI say that ILECs will otherwise use ambiguities to foster additional delay (e.g., according to AT&T/MCI, FCC orders generally have a release date, an effective date, and a date when rules are published in the Federal Register). A specific compliance date will not be adopted. The FCC can be expected to make the effective date of its order clear. Unless an FCC order is suspended, ILECs must comply with that order when it is effective, and implement its results within whatever amount of time the FCC allows. Other than to point out that the CPUC expects compliance with an FCC's orders without delay, a more specific amount of time need not be adopted here. As such, however, if ILECs are later found by the CPUC to have unreasonably delayed implementation of any FCC order on this matter, the ILEC will be subject to not only whatever penalty might be applied by the FCC, but a reasonable penalty or sanction applied by the CPUC.

AT&T/MCI, ORA, and TURN present a very intriguing argument that competition may be advanced by requiring ILECs to provide access to the high frequency portion of the loop as part of a UNE-P. This would allow capture by a voice CLC of an ILEC's voice customer, with no change in the data CLC, with no interruption of service, and at a potentially reduced cost. This will not be ordered here, however, since it requires that the ILEC either (1) own the splitter, or (2) provide the splitter as part of the loop. ILECs are not required to own splitters as a result of this interim arbitration. (See Issue 4.) Further, splitters are not required to provide 'plain old telephone service' or POTS. To the extent existing systems are POTS systems, splitters are not part of the loop. The matter, however, is before the FCC for further consideration. The FCC might consider, among other things, the changing nature of the POTS systems, and the impact on competition. On balance, it is best to await the FCC's determination.

Therefore, ILECs are not directed as a result of this arbitration to provide access to the HFS portion of the loop as part of the UNE-P. Nonetheless, ILECs must do so without delay to comply with any FCC ruling that affirms the position of AT&T and MCI on this matter. The ILEC amendments implementing such FCC ruling must provide that the service is available to begin consistent with any date ordered by the FCC. To facilitate commencement of this option, the amendments shall become effective when filed at the CPUC, unless suspended by the Director of the Telecommunications Division.

B. Operational Issues: Issues 8 – 20

6.8. Issue 8: What type of access may CLCs have to ILEC's operational support systems ("OSS") during the line sharing UNE pre-order and ordering processes?

ILECs assert that they are providing nondiscriminatory access to necessary pre-ordering and ordering information, and that the issue need not, or should not, be addressed here. CLCs contend ILECs have data they are not making available to CLCs. CLCs argue that they should have both electronic and manual access to all data, and be able to make their own determinations about whether or not a line is xDSL-capable. CLCs also seek an order here requiring ILECs to allow CLCs to order loops for line sharing using real-time electronic interface no later than June 6, 2000.

In general, CLCs are right. Pacific asserts that access to systems which contain data is not the issue.[20] Rather, Pacific says the issue is whether CLCs have access to the same information as the ILECs. Pacific says it will make all requisite information contained in Pacific's "back office systems" pertaining to line sharing available to CLCs through gateway systems by May 29, 2000, and that direct access to Pacific's back office systems will not provide CLCs with any additional information necessary to line sharing. To prove its point, Pacific has offered to audit its systems to demonstrate to CLCs that the interfaces do not withhold any information that is necessary for line sharing.[21]

The record here does not show when the audit will be completed. The FCC requires access to relevant information that exists anywhere in the company:

> "We also clarify that under our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel." (FCC Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98, adopted September 15, 1999, released November 5, 1999, ¶430; "UNE Remand Order.")

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[20] These systems include Trunk Inventory and Record Keeping System (TIRKS), Service Order Retrieval and Distribution (SORD), Loop Facility Assignment Control System (LFACS), Facility Assignment Control System (FACS), Automatic Pricing, Terminals, Options and Services (APTOS), IFGS, and DSTS.

[21] Pacific says this is part of SBC's Plan of Record for Pre-Ordering and Ordering xDSL and other Advanced Services (Plan of Record or POR) on OSS issues before the FCC.

Absent a satisfactory audit result with which CLCs agree, it is reasonable to require that ILECs make available to CLCs any information that may be relevant to the provisioning of line sharing. It is not up to the ILECs to decide what data is and is not useful or relevant. DSL technologies are evolving. What the ILEC determines to be necessary, relevant, and useful information for its product may or may not be what is necessary, relevant, and useful information for a CLC.

GTE asserts that it will have its Mechanized Loop Qualification Verification loop prequalification system in place by May 17, 2000. Again, however, it is not clear here whether or not GTE's system will contain all the data needed and desired by CLCs.

No ILEC raises any claim about the data being confidential, or being unable to work out systems with CLCs that protect any data that might be confidential. Therefore, ILECs should make available all OSS data during the line sharing UNE pre-order and ordering processes.

Covad explains why it believes an electronic interface for loop ordering is important, and states its frustration with GTE on this matter since 1996. While Covad may be right, OSS matters continue to be developed in other CPUC and FCC proceedings. There is no convincing evidence here that ILECs are failing to reasonably develop electronic interfaces as soon as possible. It would be an idle act to here order ILECs to provide a real-time electronic interface for loop ordering, or any other electronic interface, by June 6, 2000 if that interface is simply not available.

CLCs ask for access to the Advanced Solutions Ordering System (ASOS) used by Pacific and ASI. This request is denied. ASOS is a front-end ordering system developed by ASI to take initial orders from customers for advanced services. It is not used to order wholesale services from Pacific. It was developed by ASI, and it does not belong to Pacific, nor is it being provided by Pacific. Pacific can market ASI services under the terms of FCC orders. No other CLC is entitled to have Pacific market its services. Other CLCs have developed their own customer ordering systems.

GTE says it does not have data on some devices (e.g., low pass filters), and other devices are not used on POTS (e.g., repeaters). If GTE does not have the data available to itself, it is not required to provide it to a CLC. If a device is not used on a POTS line, GTE can state that to a CLC. If a POTS line contains a device that is normally not there (e.g., repeater), and GTE has knowledge of that device, GTE must provide that information to a CLC.

Therefore, CLCs' position is adopted in this arbitration to the extent that ILECs must make available to CLCs all OSS data during the line sharing UNE pre-order and ordering processes. ILECs shall make available to CLCs all data contained in LFACS, FACS, TIRKS, APTOS, IFGS, DSTS, and other relevant systems, with the exception of ASOS. ILECs shall make that information available in a non-discriminatory manner in parity with the data and access it gives all other CLCs, including corporate affiliates. ILECs, however, need not implement any electronic interfaces that do not currently exist. ILECs shall provide access to new electronic interfaces as they become available as soon as possible.

Parties shall include modified language in Pacific's and GTE's adopted amendments. Parties may begin with the CLCs' proposed language (e.g., Exhibit 13, Section VIII). The revisions should delete references to "home run copper" and "fiber-fed DLC" consistent with this Report. They should delete references to electronic interfaces by June 6, 2000 (unless they exist), and simply refer to "as soon as possible."

6.9. Issue 9: Should a time interval be established for access to preordering information?

ILECs say no. CLCs say yes. CLCs ask that ILECs be required to provide CLCs with real-time, direct electronic access to loop makeup information by June 6, 2000.

No time interval will be established here. Nondiscrimination provisions of the Act, FCC orders, and the CPUC's OSS performance measures all require parity. All ILECs, CLCs, and corporate affiliates will have equivalent access.

Further, experience is needed with access to preordering information before a standard can be established. There is insufficient evidence here to adopt a specific time interval.

Moreover, it would be an idle act to grant CLCs' request that ILECs be required to provide CLCs with real-time, direct electronic access to loop makeup information by June 6, 2000 if those systems are not in place. Nonetheless, as soon as they are in place, ILECs must make them available to CLCs.

CLCs ask that, until mechanized systems are in place, ILECs give CLCs pre-ordering functionality in "a reasonable manual interval." (CLC Opening Brief, page 43.) That is reasonable in the context of parity with ILECs and CLCs, but nothing needs to be, or is, ordered beyond existing parity provisions.

6.10. Issue 10: What are the appropriate intervals for provisioning and installation of Line Sharing UNE?

Pacific proposes intervals from 5 days to a number of days agreed between the parties, but in all cases in parity with intervals applicable to Pacific's xDSL-based services, or its affiliate's services, whichever is less. GTE proposes provisioning in 5 to 11 days, in parity with retail ADSL provisioning.

CLCs seek shorter intervals. CLCs testify that the actual work is less than stated by ILECs, and appropriate intervals will shorten as experience is gained.

The FCC expects parity:

> "Specifically, we expect that incumbent LECs will implement ordering and provisioning mechanisms and interfaces that provide competitive LECs with the ability to obtain access to the high frequency portion of the loop in the same ordering and provisioning time intervals that the incumbent provides for its own xDSL-based service." (FCC Line Sharing Order, ¶ 107, footnote omitted.)

CLCs fail to convincingly show that the proposals of ILECs are inconsistent with parity, or that less than parity is reasonable. While the work may be done more quickly than allowed by the ILECs' intervals, it would be unreasonable to adopt short intervals here. It would be unreasonable since the expectation is that there will be fast implementation of xDSL service, with large-scale mass-marketing. ILECs and CLCs are seeking as many customers as possible, and will continue to do so after June 6, 2000. The expected increase in demand will likely challenge any but the most liberal of preset intervals for provisioning and installation of the line sharing UNE. It would be particularly unreasonable to adopt intervals shorter than parity since failure to complete the provisioning and installation would be a breach of contract, and invite unproductive conflict. The ILECs' position is adopted.

6.11. Issue 11: What should be the time frame for performance of a line and station transfer?

ILECs propose intervals consistent with provisioning and installation of the line sharing UNE. CLCs seek shorter intervals consistent with their recommendations for shorter intervals for provisioning and installation of the line sharing UNE.

The ILECs' position is adopted. The work required for a line and station transfer is about the same amount as required for provisioning and installation of the line sharing UNE. Therefore, the same intervals are reasonable, including parity with a line and station transfer for an ILEC's own customer, or that provided to a corporate affiliate.

6.12. Issue 12: In order to consider installation of the Line Sharing UNE complete, must the CLC affirmatively accept the Line Sharing UNE?

ILECs say no. CLCs say yes. The CLC position is adopted.

Several events are triggered when a service order is closed (e.g., billing and provisioning). Pacific argues that it is important to close the service order timely so the other events can commence. The evidence, however, is not convincing that any delay in initiation of these other events will materially affect timely initiation of xDSL service.

CLC witnesses testify that UNE loops can have problems that make them unusable when released by the ILEC. Loop acceptance testing provides the CLC an opportunity to test and verify that the loop is actually working prior to loop turnover. This should be done jointly with the ILEC if at all possible, or might be done sequentially if necessary.

Acceptance testing can be crucial to providing good customer service. The ILEC and CLC will be "sharing" the customer. When a problem occurs, the customer cannot easily determine whether it is the ILEC's or CLC's "fault." Good customer service requires that both the ILEC and CLC provide good service, despite the source of any particular problem.

By mutually agreeing that the loop has been properly installed and is working before the ILEC closes the order, the CLC avoids opening a trouble ticket if the loop is later found to have been installed improperly. The initial mutual agreement facilitates early, successful initiation of xDSL service. Moreover, real time testing and performance feedback to installers will ensure installers learn quickly if they are making any mistakes, or if there are any generic problems that must be addressed. This avoids delays that result from opening a trouble ticket and assignment of other personnel for the subsequent rework, as well as delays in getting relevant feedback information (if any) back to the initial installers. On the other hand, if the CLC is forced to open a maintenance trouble ticket, the work will go into the general maintenance population that contains all troubles, rather than the more focused installation ticket.

Allowing CLCs to agree with ILECs that a line-shared loop has been installed properly avoids surprises for the CLC when it installs xDSL service at the customer's premises. Surprises are avoided because the CLC technician knows there is a working loop before going to the customer's premises. Customer frustration and scheduling delays are minimized when the CLC knows there is a working loop, and that the central office work has been successfully completed.

ILECs do not convincingly refute CLCs' claim that ILECs provide acceptance testing prior to loop turn over for their own customers. For example, GTE first tests its loops for continuity and balance to provide quality customer service to its own customers. Parity demands the same for CLCs.

GTE argues that cooperative testing is not required by the FCC Line Sharing Order. While true, nothing in the FCC Line Sharing Order prevents or forbids the adoption of CLCs' recommendation here.

GTE contends that acceptance testing here will be inconsistent with measures adopted by the CPUC in its ongoing OSS proceeding which, according to GTE, excludes a measure for cooperative testing. Even if true, successful commencement of this market is crucial. The xDSL market promises to significantly advance the CPUC's goal of vigorous and healthy competition in telecommunications markets. It is vital that this market begin as smoothly and successfully as possible. Initial, cooperative acceptance testing will advance that objective.

GTE asserts cooperative testing is time consuming and expensive, and any problems may be addressed in other ways. Although cooperative testing may be time consuming, ILECs and CLCs can work out protocols that will make cooperative testing time-efficient. Cooperation between the companies (who will have a long-term working relationship) to ensure they are jointly providing a working product and service will be a better use of time than the time spent with angry customers. It is also a better use of the customer's time. Collaboration between the companies can reduce the cost of cooperative testing, and minimize the customer's time and expenses (e.g., taking time off work, or making other arrangements) associated with a failed installation. GTE is right that problems may be addressed in other ways (e.g., trouble tickets). As stated above, however, it is preferable to have speedy completion of the installation, and real time testing and performance feedback to the installers.

GTE agrees in principle that the performance testing recommended by CLCs may improve customer service. GTE says, however, that GTE's systems do not currently have the required capabilities. GTE states that it simply cannot modify its system by June 6, 2000 to provide cooperative testing. Further, GTE says it is inconsistent to decline to order that ILECs provide real-time electronic interfaces for loop ordering by June 6, 2000 (Issue 8), but order cooperative testing as desired by CLCs.

To the contrary, GTE's evidence is not compelling that it cannot reasonably modify its systems by June 6, 2000. The ultimate goal might be fully automated, simultaneous, cooperative testing. That goal might not be able to be achieved by June 6, 2000. GTE, however, can institute some method of alerting the CLC when

GTE believes the line is ready for xDSL service, and waiting for the order to be closed until it hears back from the CLC that the CLC accepts the line (e.g., a telephone call, an e-mail message, a fax, a sign-off by GTE and CLC technicians). Further, there is no inconsistency is declining to order new real-time electronic interfaces by June 6, 2000 (which will take time to develop and test), but to order that the CLC affirmatively accept the line before the installation is considered complete, even if that affirmative acceptance must rely on existing technology.

Adoption of CLCs' proposed contract clause here does not require cooperative testing in a highly sophisticated way, or in a way that requires the development of any new technology. (See Exhibit 13, Section IX.A.4; also GTE's dueling clause Line Sharing Amendment dated May 18, 2000 at Section 2.11(d).) Rather, it may for now use existing methods of communication and technology.

To the extent even this use of existing systems may require some modification to GTE's current order processing workflow, the importance of smooth and successful commencement of this market outweighs the additional burdens. GTE and Pacific should develop protocols with CLCs for both the near and long terms that make this process time-efficient and cost-effective for all parties.

Pacific states that the FCC Line Sharing Order permits ILECs to complete the service order when the ILEC's activity on the line is done. Pacific argues that requiring Pacific to hold the order open pending CLC's affirmative acceptance is legal error. To the contrary, the FCC states that: "the completion date [for the provisioning interval] is the day that the incumbent completes the service order activity." (FCC Line Sharing Order, ¶ 174.) As provided by this FAR, the incumbent completes the service order activity only when the CLC affirmatively accepts the line. This does not conflict with the FCC's order.

Further, the FCC allows the states "to impose additional, pro-competitive requirements consistent with the national framework established in this order." (FCC Line Sharing Order, ¶ 159.) Even if considered additional to existing procedures, this requirement is permitted. It is pro-competitive since it will facilitate a smooth and successful commencement of this market, which promises to advance the CPUC's goal of vigorous and healthy competition. It is consistent with the FCC's national framework "to promote the availability of competitive broadband xDSL-based services…" (FCC Line Sharing Order, ¶ 5.)

Pacific is concerned that there are no contract provisions to require the CLC to accept or reject the line within a specific amount of time. Pacific says failure to meet performance measures relative to the provisioning of UNE loops can result in penalties to ILECs. Consequently, according to Pacific, CLC failure to accept a line, even if the line is working properly, can subject an ILEC to penalties. Pacific asks that CLCs not be required to affirmatively accept the loop, or that a CLC's failure to accept a working loop not subject Pacific to penalties. Pacific's request is denied.

CLCs are in business to make a profit. Profits can begin to accrue only when revenues flow. Revenues flow only when the line is accepted, and service to the customer begins. Further, the evidence here shows CLCs are very concerned about providing good service, delivering good performance, and maintaining good customer relationships. Any delay in accepting the line without reasonable cause will harm the relationship between the CLC and its customer. Thus, there is adequate reason to believe that CLCs have ample incentive to accept a working line quickly without a specific deadline in the contract.

Further, there is no evidence that CLCs individually, or collectively, will undertake any specific efforts to result in an ILEC being penalized. In addition, the possibility of a penalty will give ILECs increased incentive to do everything reasonable to ensure that the line is working timely, and the CLC has an easy way to test and inform the ILEC that the line is accepted. This is further reason to deny Pacific's request.

Finally, to the extent Pacific's request modifies a prior Commission order regarding OSS performance and penalties, notice and opportunity for comment must be provided to the parties in that proceeding. That effort, and coordination with another proceeding, will not be undertaken in this interim arbitration.

Therefore, CLCs' contract clause IX.A.4 is adopted. Parties shall modify the clause to exclude references to "home run copper" consistent with other decisions in this Report.

6.13. Issue 13: What acceptance testing must ILEC perform?

Pacific says it will perform acceptance testing on loops that require technicians to be dispatched to the field, but that CLCs must notify Pacific of tests CLCs want on loops that do not require technician dispatch. Pacific says it will provide CLCs with a loop that has continuity, line balance, is suitable for POTS, and has any ordered conditioning completed. If xDSL service does not work, Pacific says the CLC must accept the loop if Pacific has provided continuity and line balancing. GTE says it will test all line sharing loops for continuity and line balancing. GTE agrees with Pacific that if the loop tests trouble-free, the CLC must accept the loop.

CLCs say ILECs should be required to verify continuity and line balance. According to CLCs, once the ILEC completes testing, the CLC may either accept the line or may conduct its own tests.

Parties agree that ILECs must verify continuity and line balancing. In addition, it is reasonable that ILECs will affirm that the line is suitable for POTS, and that all ordered conditioning is complete. As a result, ILECs must provide a line that is operable.

CLCs object to paying additional charges for acceptance testing. CLCs are right. ILECs charge for installation and conditioning, and, through those charges, recover reasonable costs for the line to be operable. ILECs shall not assess charges for acceptance testing, with one exception. If the CLC rejects a line that is later determined to have been operable, and the trouble was not a result of any failure by the ILEC in provisioning the line, the CLC shall pay the ILEC appropriate and reasonable charges associated with the ILEC's subsequent testing and provisioning of the line after the CLC's initial rejection.

For the reasons stated above with Issue 12, ILECs' proposal that CLCs be required to accept the loop is rejected. CLCs' position is adopted, wherein CLCs may accept the loop or conduct their own tests. In particular, CLCs must affirmatively accept a line. Parties are encouraged to develop protocols for cooperative testing.

6.14. <u>Issue 14</u>: What testing can a CLC conduct and when?

Parties generally agree that whoever owns the splitter is responsible for testing, but disagree on how and when the test may be performed.

The FCC Line Sharing Order provides the following guidance on loop testing:

> "Based on the record before us, we agree with the competitive LECs that a relatively low level of incumbent LEC effort is required to ensure that competitive LECs have access to appropriate loop testing access points. [Footnote omitted.] Thus, we require that incumbent LECs must provide requesting carriers with access to the loop facility for testing, maintenance, and repair activities. We require that, <u>at a minimum</u>, incumbents must provide requesting carriers with loop access either through a cross-connection at the competitor's collocation

space, or through a standardized interface designed for [sic] to provide physical access for testing purposes. Such access must be provided in a reasonable and nondiscriminatory manner. An incumbent seeking to utilize an alternative physical access methodology may request approval to do so from the state commission, but must show that the proposed alternative method is reasonable, nondiscriminatory, and will not disadvantage a requesting carrier's ability to perform loop or service testing, maintenance, or repair. We stress that incumbents may not use their control over loop testing access points and mechanisms for anti-competitive or discriminatory purposes, and that we will remain attentive and ready to respond to any reported anti-competitive incidents relating to competitive LEC access to loop testing mechanisms." (FCC Line Sharing Order, ¶ 118, emphasis added.)

That is, at a minimum, ILECs must provide CLCs with loop access for testing. This is to the whole loop, not a subset of the loop. ILECs must obtain permission from the state PUC for anything different.

This is codified in the FCC's rules in the following way:

"Maintenance, Repair, and Testing.

"(i) Incumbent LECs must provide, on a nondiscriminatory basis, physical loop test access points to requesting carriers at the splitter, through a cross-connection to the competitor's collocation space, or through a standardized interface, such as an intermediate distribution frame or a test access server, for the purposes of loop testing, maintenance, and repair activities.

"(ii) An incumbent seeking to utilize an alternative physical access methodology may request approval to do so from the relevant state commission, but must show that the proposed alternative method is reasonable, nondiscriminatory, and will not disadvantage a requesting carrier's ability to perform loop or service testing, maintenance or repair." (47 C.F.R 51.319(h)(7).)

Physical access at the splitter is understood to mean that CLCs have access to the line in such a way that they can check both sides of the line. Otherwise, as NorthPoint makes clear, the CLC does not have access to the entire loop.

Pacific's proposed amendment language fails to provide CLCs with reasonable, necessary, minimum access to the entire loop consistent with the FCC's Order.[22] CLCs proposed amendment language is more consistent with the FCC's Order.

Pacific asserts that if CLCs are unresponsive to Pacific's attempts to coordinate repair, and if an end-user's voice service is not functioning, Pacific can act without the approval of the CLC and take whatever steps are necessary to restore voice service. CLCs are concerned about an ILEC coordinating with the CLC, and request no less than two hours advance notice of any repair to restore completely lost voice service. Coordination is vital, but a minimum of two hours advance notice is unreasonable. Voice service can be vital for health and safety reasons. Parties must seek to cooperate, but, if cooperation fails, Pacific's assertion is reasonable.[23]

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[22] For example, Pacific says "CLECs will not be permitted direct physical access to the SBC-owned splitters, including the MDF or the IDF, for testing." (Proposed Appendix DSL, Section 5.1.2.) Pacific makes no mention of providing a physical loop test access point to requesting CLCs at the splitter, through a cross-connection to the competitor's collocation space, or through a standardized interface, such as an intermediate distribution frame (IDF) or a test access server, for the purposes of loop testing, maintenance, and repair activities, as required by the FCC.

[23] Issue 14 in the Issue Matrix cites Pacific's contract language at Sections 5.1.2 and 9.5. These sections, however, do not seem to address this issue. Section 9.3 seems to address this issue, but differently. The cooperation expressed in Section 9.3 between CLC, ILEC and the end user should be followed. As a last resort, Pacific should restore voice service without the CLC's approval. The parties should address this in revised language.

CLCs ask that in no event should the ILEC be allowed to perform work that interferes with the flow of data to a CLC customer without first coordinating with the CLC. CLCs are right. As noted in the GTE proposed amendment, life support data might be transmitted over the high frequency part of the loop, such as heart monitor data. (GTE Line Sharing Amendment, Section 2.11(c).) Reasonable coordination must be undertaken by both the ILEC and CLC for all repair work.

On balance, the CLCs' proposed language is more consistent with the FCC Line Sharing Order than is Pacific's proposed language. CLCs' proposed language is adopted, with the exception of the 2 hour notice by the ILEC for repair for voice service.

Pacific contends that the decision here is based on Pacific's original refusal to allow direct physical access to SBC-owned splitters, but that Pacific changed its position during cross-examination. Pacific says it will now place Pacific-owned splitters in a common area for CLCs to have access, and that Pacific's revised Appendix DSL reflects this change. Therefore, Pacific says that CLCs have adequate test access, and that access to the intermediate distribution frame, or through a cross-connection to the CLC's collocation space, is unnecessary. Pacific's request is not adopted.

The FCC requires that:

> "…at a minimum, incumbents must provide requesting carriers with loop access either through a cross-connection at the competitor's collocation space, or through a standardized interface designed…to provide physical access for testing purposes…An incumbent seeking to utilize an alternative physical access methodology may request approval to do so from the state commission, but must show that the proposed alternative method is reasonable, nondiscriminatory, and will not disadvantage a requesting carrier's ability to perform loop

or service testing, maintenance, or repair." (FCC Line Sharing Order, ¶ 118.)

Further, the FCC specifies that ILECs must alternatively provide test access points though a standardized interface, such as an intermediate distribution frame. (47 C.F.R. 51.319(h)(7)(i).)

Pacific's showing fails to sufficiently conform to these requirements. Pacific fails to present a compelling case that its proposal is reasonable, nondiscriminatory, and will not disadvantage a CLC's ability to perform loop or service testing, maintenance, or repair. Covad points out that CLCs need access to other testing points (e.g., a standardized interface designed to provide physical access at the intermediate distribution frame) to have access to the entire line. CLC's proposed language is adopted, with the exception of the 2 hour notice.

On the other hand, GTE's proposed language is consistent with the FCC Order, and is adopted. Both GTE and CLC refer to the "test head." Final language shall define the test head consistent with the FCC's regulations (e.g., physical loop test access point at the splitter.)

Parties agree that test access should be 24 hours a day, seven days a week. ILECs provide that they will test their own equipment. As provided herein, however, CLCs must have 24 hour, seven days a week nondiscriminatory physical test access to the entire loop at a test access point at the splitter, through a cross-connection to the competitor's collocation space, or through a standardized interface (such as an intermediate distribution frame or a test access server) for the purposes of loop testing, maintenance, and repair activities.

6.15. <u>Issue 15</u>: What testing, maintenance, and repair access shall CLCs have to the line sharing UNE using Fiber-Fed DLC?

ILECs say this is not part of this arbitration, while CLCs contend it is.

As decided in Issue 3 above, access on the fiber-fed DLC is not ordered herein. If access to the high frequency part of the fiber loop becomes available as provided in Issue 3,[24] however, then testing, maintenance, and repair access shall be provided to line sharing CLCs who use fiber-fed DLC, just as it is for the copper loop addressed in Issue 14.

6.16. Issue 16: What is an appropriate trouble response time?

ILECs propose parity with retail service. That is, ILECs will respond as quickly as possible, with 24 hours as an appropriate response time. CLCs ask for a mean-time-to repair of two hours, applied monthly.

Parity is the standard that should apply. As such, the ILECs' proposals are adopted. Better service is always desirable. No evidence presented here, however, is compelling that CLCs should obtain a two-hour mean-time-to-repair interval (applied monthly), or anything superior to that provided by ILECs for their own retail xDSL service.

6.17. Issue 17: What is the appropriate interval for the installation and provision of tie cables necessary for CLC to use line sharing?

ILECs contend this is a collocation matter. CLCs ask that ILECs be directed to process all CLC applications for cable augmentations, and other equipment necessary for line sharing, in a period no more than 30 days after receipt.

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[24] That is, it might become available in one of the following ways: as a result of negotiated, mediated or arbitrated Appendix DLE-DSL for Pacific or the equivalent for GTE; a decision by the FCC that fiber is included within the line sharing UNE; or the initiation of carriage over fiber by Pacific or GTE of xDSL traffic for any Pacific or GTE customer, or customer of a Pacific or GTE affiliate.

ILECs' position is adopted. The interval for tie cable installation is a collocation matter. As GTE says, setting intermediate intervals for every piece of equipment will not enhance the likelihood that service will be provisioned smoothly and timely. Rather, multiple and unnecessary intervals detract from efficient operations.

CLCs argue that the June 6, 2000 deadline for line sharing will not be met if the CLCs' recommended 30 days is not adopted for this issue. To the contrary, adoption of the CLCs' recommendation will not result in meeting the June 6, 2000 date. Amendments that result from this arbitration will be effective by June 6, 2000. Even if the CLCs recommendation is adopted, however, implementation of that provision would not be until after June 6, 2000. It is unreasonable to adopt different intervals for different pieces of equipment, as GTE argues. Moreover, in Pacific's case, Pacific has already initiated a rating and ranking of central offices for rapid deployment. Once the initial deployment is completed, future cable augmentations should be subject to the standard process determined for collocations.[25]

6.18. <u>Issue 18</u>: What time frame should be required for splitter installation when ILEC owns the splitter?

Widely different recommendations are made. The ILECs' proposals are adopted since ILECs need not own the splitter. (See Issue 4.)

Pacific's initial splitter deployment is through the rating and ranking process with CLCs, and is reasonable. After the initial splitter deployment, splitters associated with cables and other equipment will be installed according

[25] No issues are being deferred to any collocation proceeding as a result of this decision. Rather, parties must comply with existing collocation rules and decisions.

to the collocation tariff. Pacific gives itself an extra 10 business days to install and provision a CLCs' line sharing order if the CLC fails to submit a forecast. Forecasts are non-binding (see Issues 4 and 37), but forecasts are a useful planning tool. If the CLC completely fails to provide a forecast, it is not unreasonable that Pacific may need more time to fulfill the order. Pacific's proposed language is adopted.

GTE argues that installation of a GTE-owned splitter should be handled as part of the normal collocation provisioning. GTE's recommendation is adopted. It is reasonable to adopt consistent equipment provisioning intervals, since the proliferation of differing requirements and intervals depending upon the piece of equipment or purpose of the equipment will make provisioning unmanageable. Moreover, GTE has agreed through a collaborative process with CLCs to modify its collocation application forms so that line sharing forecasts can be submitted at the same time as collocation requests, thereby streamlining the process. This will facilitate splitter installation of GTE-owned splitters, and is reasonable.

CLCs contend that installation must be completed by June 6, 2000 if the ILEC owns the splitter, and asks that the Commission order Pacific to provide required splitters by June 6, 2000. This request is denied. ILECs are not required to own splitters.

Going forward, CLCs would require ILECs to install splitters within 10 calendar days of receipt of a CLC splitter order. This recommendation is also denied since ILECs are not required to own splitters.

6.19. Issue 19: Should the line sharing agreement between ILEC and CLCs address interoffice transport?

CLCs initially requested that the line sharing amendment include the provisioning of interoffice transport. CLCs withdraw this request from consideration in this interim phase, however, in the interest of reducing the number of issues. Thus, according to CLCs, ILECs would not be required to provide interoffice transport as part of the line sharing amendment so long as there are means to hand off the CLC data traffic at the serving central office.

Pacific says it already provides unbundled transport in the UNE appendix of each ICA. Pacific believes it would be confusing and possibly contradictory to include additional language in the line sharing amendment. Pacific recommends that each CLC use the transport section of the UNE appendix to order interoffice transport. There seems to be no reason why Pacific's recommendation should not be adopted. No contract language in the line sharing amendment is involved.

GTE also recommends that interoffice transport be provided pursuant to the underlying ICA (which is being amended by the DSL amendment). GTE proposes a provision in the DSL appendix that makes that clear. There is no reason to reject GTE's recommendation. GTE's recommendation is adopted.

6.20. Issue 20: If the ILEC's customer for voice service disconnects that service, should the ILEC automatically convert the line sharing circuit to a full stand-alone UNE loop, unless the CLC affirmatively requests the ILEC to discontinue that service?

ILECs say yes. CLCs say no. The ILECs' recommendation is adopted, subject to the modifications explained below.

Consistent with the resolution of Issue 6, the ILEC shall convert the line sharing circuit to a full stand-alone UNE loop. This is not dependent upon the CLC taking or not taking any affirmative action.

CLCs, however, ask that the CLC be given reasonable notice of the customer disconnection of voice service, a reasonable amount of time to contact the customer, and a reasonable amount of time to inform the ILEC of whether to roll the customer to a stand-alone xDSL loop. CLCs do not propose any specific amount of time as the reasonable amount needed.

Pacific says it will notify the CLC if Pacific's customer disconnects service. Pacific offers that it will automatically convert the line sharing circuit to a full stand-alone UNE loop absent a request from the CLC within three days to discontinue use of the high frequency portion of the loop. (Pacific Opening Brief, page 41.) While this may be a short amount of time, it would be unreasonable to require the ILEC to maintain the shared circuit very long before making the conversion. Three days is reasonable, particularly without any recommendation from CLCs to the contrary.

Pacific references Section 4.2 in its proposed amendment. (Issue Matrix, Issue 20.) Section 4.2, however, fails to contain any reference to three days. Pacific must modify Section 4.2 accordingly.

Further, the FCC Line Sharing Order is clear that when the customer cancels service, the CLC must buy the entire UNE loop if the CLC wishes to continue service. The ILEC, however, cannot cause or require any interruption in service to execute the loop access status change. (FCC Line Sharing Order, ¶ 73; see Issue 6 above.) Section 4.2 of Pacific's amendment does not make this statement. It should be modified accordingly.

GTE says that: "GTE will notify the CLEC, and the line sharing circuit should automatically covert to a UNE loop." (Issues Matrix.) GTE's brief indicates that GTE does not intend to force any CLC to take a stand-alone loop, but that the rollover will take place only if the CLC does not communicate a contrary desire. (GTE Opening Brief, page 45.) In the Issues Matrix, GTE references its proposed amendment Section 1, paragraph 1.2(b). Section 1, paragraph 1.2(b) does not provide a specific timeframe for notifying the CLC, only that GTE and the CLC shall cooperate to transition the continuation of DSL service without line sharing in a manner permitted by, and subject to, applicable law.

CLCs' position that CLCs be given a reasonable amount of notice and time to convert to a UNE loop or terminate service is adopted. At the same time, however, no affirmation action is required by the CLC before the ILEC may make the conversion after notice and a reasonable amount of time. As such, GTE's amendment should be modified. GTE's amendment should either provide for three days after which there is an automatic conversion unless notified by the CLC to the contrary, or no less than three days before an automatic conversion as the parties cooperate on the transition. GTE may decide on one or the other choice. Further, GTE's amendment should make clear that there will be no interruption of service, consistent with applicable law.

C. Pricing Issues: Issues 21 - 31

6.21. Issue 21: Should the High Bandwidth Service Overlay Model (HBSOM) and the High Bandwidth Service Nonrecurring Cost Model (HBSNRCM) be used as a basis for line sharing prices or for prices related to transport over fiber between the Remote Terminal and Central Office?

CLCs recommend use of the HBSOM and HBSNRCM to establish prices in this interim arbitration. CLCs assert that both models comply with FCC total element long run incremental cost (TELRIC) principles, and CPUC Consensus Costing Principles. According to CLCs, both models were provided to ILECs in electronic format with supporting workpapers. CLCs claim that no other party proposed prices over fiber-fed loops, and the CPUC must, therefore, either adopt CLCs' recommended prices or stifle advanced services over fiber-fed loops.

CLCs' recommendation is not adopted. There has simply been inadequate opportunity in this interim arbitration for parties and the CPUC to test and evaluate these two models. ILECs received information from Joint Petitioners only two business days before ILECs' rebuttal testimony was due. Nonetheless, limited review suggests that these models are based on the Hatfield Model. CLCs do not deny this. The CPUC rejected an earlier version of the Hatfield Model, finding that it contained numerous deficiencies. (See Decision (D.) 98-12-106.) There has not been sufficient time to determine whether the current versions of the models cure the deficiencies that led to the CPUC's concerns.

Moreover, ILECs provide evidence upon which to determine reasonable prices in this interim arbitration without reliance on these models. The ILECs' recommendations will be used (except to the extent modified in the discussion of issues below) to determine prices for line sharing over the copper loop.

This is also reasonable since all prices here are subject to later adjustment and true-up. No matter the level of costs and prices adopted here, adjustments will be made based on costs and prices adopted in the final phase of this proceeding, including interest.

Whether prices are set too high or low compared to final prices, CLCs will simply need to make a business decision how to proceed. That is, if prices are set too low here, and are later adjusted upward, CLCs will need to pay the difference with interest. CLCs must take that risk into account in making business and pricing decisions in the interim.

Similarly, if prices are set too high here, and are later adjusted downward, CLCs will receive a refund with interest. CLCs can take that opportunity, and the probability of that opportunity, into account in making current business and pricing decisions.

At the same time, the goal here is to set prices that will require the least subsequent adjustment. Prices here are not set with the goal of being "too high" or "too low." Rather, they are generally set as close to what might be final rates as possible. Given the limited record in this interim phase, however, it is possible that final rates will need some adjustment.

The CPUC seeks competition that is fair, equitable, and reasonable, and that will promote a vigorous and healthy market on a level playing field for all competitors. Similarly, the FCC Line Sharing Order seeks to promote competition between CLCs and ILECs without giving preference to any competitor. The decisions made herein reach that balance.

Carriage over fiber is not initially an issue, and prices for carriage over fiber need not be adopted. (See Issue 3.) If one of three events occurs, however, prices for carriage over fiber need to be determined. Since CLCs' models and price recommendations are not used, those prices will be determined as follows.

First, within 30 days Pacific will complete its Appendix DLE-DSL, including prices, and within 90 days GTE will complete a similar appendix. These prices may be used for line sharing or transport over fiber, subject to true-up in the final phase of this proceeding. CLCs may adopt those appendices and prices (subject to true-up). If adopted, the appendices and prices (subject to true-up) will be submitted to the Commission by advice letter, and approved subject to Rule 6, CPUC Resolution ALJ-178. Alternatively, the appendices may be used as the basis for negotiation, mediation or arbitration under the Act and CPUC Resolution ALJ-178.

Second, if the FCC rules in favor of line sharing or transport over fiber, ILECs are directed above to file further amendments to their DSL appendices. Those further amendments will include prices, and will be available for adoption by CLCs subject to Rule 6 of Resolution ALJ-178. The prices therein will be subject to adjustment based on the final phase of this proceeding, including interest. If CLCs dispute the offering and are not satisfied that prices are subject to later true-up, they may use the further amendments as the basis for negotiation, mediation or arbitration under the Act and CPUC Resolution ALJ-178.

Finally, if either ILEC provides DSL service to a customer of that ILEC (or the customer of a corporate affiliate of the ILEC) using the fiber portion of the local loop, that ILEC is directed above to amend its DSL appendix. The amendment must provide for line sharing or transport of CLC's DSL customers under the same terms, conditions and prices as provided to the ILEC itself (or a corporate affiliate) for the ILEC's customer (or the customer of a corporate affiliate). The prices will be subject to true-up during the final part of the line sharing phase of this proceeding.

Thus, for this interim arbitration, the HBSOM and HBSNRCM need not be, and are not, used as the bases for line sharing prices, or for prices related to transport, over fiber between remote terminals and the central office.

6.22. <u>Issue 22</u>: What monthly recurring price should a CLC pay for using the high frequency portion of the loop?

CLCs propose a monthly recurring price of $0.00 (i.e., no charge). This recommendation is not adopted.

CLCs cite the FCC's line sharing order in support:

> "We conclude that, in arbitrations and in setting interim prices, states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services." (FCC Line Sharing Order, ¶ 139.)

CLCs say Pacific and GTE allocated no cost "when they established price floors for their retail ADSL services at the FCC." (CLC Opening Brief, page 55.) Thus, CLCs argue that the price should be equal to the cost, or zero.

This argument is not convincing for several reasons. First, the FCC's guidance is that states may set interim prices this way. States, however, are not required to do this.

Second, according to CLCs, the ILECs allocation was for the purpose of setting price floors. Price floors are minimal prices that may be charged. Prices may be higher than price floors. The issue here is not only costs, but prices.

Third, CLCs cite Pacific's federal filing in support. In that filing Pacific stated:

> "'Several petitioners contend that Pacific must assign outside plant (local loop) costs to its ADSL service. But Commission [FCC] rules impose no such requirement. FCC Rule 61.38 requires LECs to identify the direct cost to provide the proposed new service. Pacific proposes to transmit ADSL over loops under tariffs already approved by the Commission and state regulators. Loop costs therefore contribute nothing to the direct cost of ADSL service. Pacific has offered a low-speed data-over-voice (DOV) service as part of its Generic Digital Tariff (GDT) product line in the interstate tariff since 1992. Cost allocation issues for DOV services were settled long ago.'"[26]

The costs addressed by Pacific in that filing were direct costs. Total costs also include an allocation of joint and common costs, cost of capital, and depreciation. This is true for TELRIC as well as other costs.[27] It is unreasonable to here find no allocation of joint and common costs, no contribution to cost of

[26] CLC Opening Brief, page 55, citing Reply of Pacific Bell, In the Matter of Pacific Bell, Pacific Tariff FCC No. 128, Transmittal No. 1986, Pacific's ADSL Service, June 26, 1998, at 15 (footnotes omitted; emphasis added).

[27] 47 C.F.R 51.505(a) states that TELRIC includes a reasonable allocation of forward-looking common costs. 47 C.F.R. 51.505(b) provides that TELRIC includes forward-looking cost of capital, and depreciation rates shall be economic depreciation rates.

capital, and no economic depreciation in determining the cost for the high frequency portion of the local loop, despite the level of cost Pacific and GTE used in FCC filings.[28]

The FCC provides additional guidance:

> "Under the price cap rules for new access services, the recurring charges for such services may not be set below the direct costs of providing the service, which are comparable to incremental costs. The rates the incumbent LECs set for their special access xDSL services should cover those costs." (FCC Line Sharing Order, ¶ 140, emphasis added.)

That is, the recurring charges for access to the high frequency portion of the local loop may not be set below the direct cost. If direct costs are zero, recurring charges may not be below zero. At a minimum, rates should recover direct costs. Total costs, and TELRIC, however, are more than just direct costs, and more than zero. The resulting rate should, therefore, be more than zero.

Fourth, CLCs argue that a zero price is TELRIC-compliant. To the contrary, TELRIC includes a reasonable allocation of common cost, cost of capital, and economic depreciation. Despite the direct cost Pacific and GTE allocated to its retail ADSL service under federal tariffs, it is unreasonable to here find a proper, reasonable allocation of zero common cost, zero cost of capital, and zero economic depreciation for the high frequency portion of the loop.

CLCs assert that the CPUC need have no concern that a zero price for the high frequency portion of the local loop will impose losses on Pacific and GTE.

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[28] Just because Pacific and GTE previously asserted their direct costs were zero (in filings made to the FCC in 1998) does not make it so today. It appears unreasonable on its face to find that direct costs, which include cost of capital (profit) and economic depreciation, are zero.

CLCs contend that the ILECs are already recovering the full cost of each loop through their prices for the underlying voice service. According to CLCs, any assignment of loop costs to the high frequency portion of the loop would either result in a windfall profit for the ILECs, or would require rate rebalancing.

This argument is not convincing. It is unreasonable for an ILEC to sell any product or service at a zero price. Whether or not the ILECs are already recovering the full cost of the loop, it would not be acceptable to require the ILEC to "give away" any product or service. Every product or service should make some nonzero contribution to common costs, cost of capital (profit), and economic depreciation.

The record here does not show whether ILECs are or are not recovering the full cost of each loop through prices for the underlying voice service. All prices here, however, are subject to later adjustment. If windfall profits or rate rebalancing are reasonable concerns, they may be considered later in setting the final rates. For the interim, however, it is not reasonable to find cost, including TELRIC, for the high frequency portion of the local loop is zero.

CLCs argue the "sole purposes that Pacific's $5.85 charge would serve are to increase Pacific's profits and impose a barrier to competitive entry." (CLC Opening Brief, page 58.) To the contrary, rates here are interim and subject to adjustment. If Pacific's profits are a reasonable factor to consider in setting final rates, and if the interim rates increase Pacific's profits unreasonably, final rates will remedy that problem. In fact, if CLCs prevail in the final phase and the final recurring rate is zero, Pacific's $5.85 interim charge will have no effect on profit.

Further, the rate level determined in this interim phase cannot reasonably be expected to affect competitive entry. As discussed above, CLCs now need to take into account when making business and pricing decisions that rates here are subject to subsequent true-up. Rates here may be "too high" or "too low." CLCs take the risk of eventually paying more money to ILECs, or enjoying a refund. The rate is not a barrier to competitive entry because it will eventually be adjusted, no matter the initial level.

A reasonable goal is to adopt interim rates that will not require an excessive subsequent adjustment. It is unlikely, however, given the limited record in this interim phase, that adopted interim prices will require no later adjustment. CLCs must understand this, and take this into account now in making business and pricing decisions.

Covad argues that Pacific's proposed price is nothing more than another anti-competitive attempt to maintain its monopoly advantage. This cannot be the case, since rates are subject to later adjustment, and CLCs must take this into account in making business and pricing decisions now.

Considering all factors, the rate of $5.85 per month is adopted for Pacific. This rate is 50% of the cost of an entire Pacific unbundled loop purchased by a CLC. This is a substantial discount from the full unbundled loop price. It makes a reasonable contribution to common costs, cost of capital, and economic depreciation. It provides a substantial incentive for CLCs to enter the residential market by line sharing compared to purchasing an unbundled loop.

Further, it is the rate that ASI will pay for line sharing. The FCC recognized the significance of having DSL services provided by a separate affiliate in its approval of the SBC merger with Ameritech. One of the conditions of that approval was that SBC's ILECs subsidiaries would not provide advanced services, such as xDSL. Rather, those services would be provided by an affiliate that was structurally separate from the ILECs. The FCC recognized that the creation of a structurally separate affiliate for advanced services would ensure that SBC would have no advantage over CLCs. The FCC stated:

> “’We believe that the affiliate structure set forth in the conditions will ensure that an SBC / Ameritech advanced services affiliate occupies a position in the market comparable not to an incumbent, but rather to a [sic] non-incumbent advanced services competitors.’”[29]

More specifically, the FCC considered the fact that SBC’s data affiliate would receive facilities at the same prices as other CLCs to be an important safeguard against any unfair advantage. The FCC stated:

> “’These safeguards are intended to ensure that an affiliate will not derive unfair advantages from the incumbent. The SBC / Ameritech advanced services affiliate must, for example, obtain facilities necessary for the provision of advanced services, such as local loops and collocation space, at the same rates and using the same operations support systems interfaces and procedures that are available to other competitive LECs. This gives the SBC / Ameritech incumbent strong incentive to provide the necessary inputs in an efficient, cost-effective manner that will benefit all providers of advanced services and, ultimately, the public at large.’”[30]

Line sharing was not available to CLCs at the time of the Ameritech / SBC Merger Order. The FCC created a solution by establishing a surrogate price for line sharing, enabling the CLC to obtain an entire loop from Pacific for the

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[29] Pacific Opening Brief, page 46, quoting from Application of Ameritech Corp and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules, CC Docket 98-141, Memorandum Opinion and Order, Rel. Oct. 8, 1999 (Ameritech / SBC Merger Order), ¶ 461, (emphasis added).

[30] Pacific’s Opening Brief, page 46, quoting from Ameritech / SBC Merger Order at ¶ 467 (emphasis added).

provisioning of advanced services at a reduced price. According to Pacific, the "FCC referred to this as the 'economic equivalent of line sharing.'"[31]

Pacific proposes the same price for line sharing here. According to Pacific:

> "The FCC found that such a price would 'spur deployment of advanced services by SBC / Ameritech, as well as other carriers, while ensuring that these other carriers receive treatment from an SBC / Ameritech incumbent LEC comparable to that provided to the SBC / Ameritech separate affiliate.'"[32]

Pacific is right that this price will produce the same results in California.

Pacific is also right that adopting a zero price in the interim would limit the CPUC's ability to adopt a different price after a thorough review in the final phase of this proceeding. New Edge admits as much when it says adopting a zero price now would provide "support for rejecting the adoption of a higher charge in the next phase of the proceeding." (New Edge Supplemental Reply Brief, page 3.) It would be unreasonable here to limit the CPUC's later options in the final phase of this matter. Therefore, Pacific's proposal is adopted.

Covad contends that adopting any price other than zero will have an anti-competitive effect. Covad says relying on a true-up with final rates is the only interim mechanism for ensuring competitive entry, while using a "true-down has an anti-competitive effect because the crucial initial entry of competitors will be hindered, or even precluded…" (Covad Comments on DAR dated May 15, 2000, page 16.)

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31 Pacific Opening Brief, page 47, citing from Ameritech / SBC Merger Order, ¶ 369.

32 Pacific Opening Brief, pages 47-48, citing Ameritech / SBC Merger Order at ¶ 370.

To the contrary, there is no evidence here regarding the price elasticity response of CLC customers to different prices CLCs might set for xDSL service, and the resulting effect on CLCs. There is no evidence on the profit margins of CLCs. There is no evidence of the effect on prices to xDSL customers, or CLC profits, of any range of prices that might be set for access to the ILEC's high frequency portion of the local loop. Other than Covad's assertion, there is no convincing evidence that CLC entry will be hindered or precluded if the price set here is $5.85. On the other hand, a rate that is a substantial reduction from the price of a UNE loop is very likely to spur deployment of advanced services by all carriers, as the FCC noted.

GTE proposes a zero price in the case of a CLC-owned splitter, and says the price "need not be addressed by the arbitrator" since this is not a disputed issue between GTE and CLCs. (GTE Opening Brief, page 52.) To the contrary, a zero price is unreasonable for all the reasons stated above.

Moreover, GTE's proposed Line Sharing Amendment states that the interim monthly recurring charge of $5.00 is "not applicable under Option No. 1 described in Section 2.3 [CLC-owned splitter], provided, however, that GTE is currently developing the MRC [monthly recurring charge] for Option No. 1 and reserves the right to apply said MRC on a retroactive basis." (GTE Line Sharing Amendment, Section 3.1, footnote 3.) This is not acceptable. The rate must be determined in this interim arbitration, and not be subject to GTE applying an interim rate on a retroactive basis. Once established here, the interim rate will apply until adjusted in the final phase of this line sharing arbitration.

Therefore, a reasonable rate for GTE must be adopted here. A rate of $3.00 per line per month for access to the high frequency portion of the copper loop is adopted. This rate will provide a reasonable contribution to common costs, cost of capital, and economic depreciation. It will result in a total recurring rate $7.20

(CLC owned-splitter) and $10.10 (GTE-owned splitter). This compares favorably to Pacific's rates of $7.34 (CLC owned-splitter) and $9.88 (Pacific owned-splitter). (See Exhibit 251.) It is a substantial discount from GTE's unbundled loop price of $16.81. This provides a substantial incentive for CLCs to enter the residential market by line sharing compared to purchasing an unbundled loop. The rate is subject to later adjustment and true-up. CLCs will take this into account in making business and pricing decisions now. At the same time, this rate will maintain reasonable flexibility for the CPUC in the final phase of this proceeding, without being unduly and unreasonably burdensome on CLCs and their customers.

Several parties argue that GTE's monthly recurring price for access to the high frequency portion of the loop was not presented for arbitration, and may not be resolved in this interim arbitration. Rather, they contend that parties did not dispute this issue, and the undisputed outcome recommended by the parties must be adopted. This is incorrect for several reasons.

First, GTE does not agree to a zero price. Rather, its proposed amendment states that "GTE is currently developing the MRC for Option No. 1 and reserves the right to apply said MRC on a retroactive basis." (Line Sharing Amendment, Section 3.1, footnote 3.) It is unclear by this language when GTE seeks to develop the rate, and apply the rate retroactively. Even if GTE means that determination of the rate is to be deferred until final prices are later established, the rate is an issue. It is unreasonable for the reasons explained above to completely defer this issue to the final phase. Rather, the issue has been raised, and is reasonable to address it at this time, subject to subsequent true-up.

Second, this is not the usual two-party arbitration, but is a multi-party arbitration. A unified approach to some or all policy determinations is within the authority and discretion of the Arbitrator and CPUC. CLCs present differing policy recommendations on some issues, as do ILECs. It is appropriate and reasonable in most cases to decide issues similarly for all CLCs, just as for all ILECs. All evidence, argument and policy considerations must be weighed in making a determination. It is reasonable here to apply the outcome equally, despite differing recommendations by CLCs and ILECs.

Third, if the matter is not disputed, the item might be considered to be a negotiated outcome. Among the several tests that are applied, the CPUC must eventually determine whether each negotiated outcome is in the public interest. (47 U.S.C 252(e)(1) and 252(e)(2)(A)(ii); CPUC's Rules 4.3.3 and 4.1.4, Resolution ALJ-178.) For the reasons stated above, it is not in the public interest for GTE's price to be zero. Since the issue has been raised, it would be unreasonable to defer consideration of this issue until the matter is presented to the CPUC and, at that time, recommend rejection.[33] Moreover, in resolving issues, "the Arbitrator shall ensure that such resolution meets the requirements of the 1996 Act." (Rule 3.10, Resolution ALJ-178.)

That is, it would be an inefficient and unreasonable use of resources to knowingly defer consideration of this issue when it has been raised. If considered an arbitrated issue, the outcome should be as found. If considered a negotiated issue, the outcome should not be deferred.

Fourth, the Act requires that carriers may not use services that are not competitive to subsidize services that are subject to competition. Further, the Act

[33] This is not to say that all undisputed or negotiated outcomes have been subjected to the tests that will eventually be applied by the Commissioners, or are found at this time by the Arbitrator to have passed. Rather, the Commissioners will subject all arbitrated and negotiated outcomes to the proper tests when the matter is before them. In this one instance, the issue has been raised and argued by the parties. A unified outcome is reasonable.

requires states to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services. (47 U.S.C. 254(k).) The CPUC has found the definition of universal service to include single party voice grade local exchange service. Therefore, the CPUC must ensure that basic exchange service bears no more than a reasonable share of the joint and common costs of the loop. The loop is required for both voice and xDSL when the line is shared. It is reasonably possible that the CPUC will eventually find that voice service should not be required to pay all shared loop costs while other services using the same line pay none. It maintains the CPUC's flexibility to assign a reasonable, modest cost to this item at this time, pending final prices being determined later.

Fifth, ILECs are now devoting massive amounts of resources to initiate broadband service "capable of meeting all customers' needs for data, voice and video products." (Exhibit 52, Attachment B, page 1.) For example, SBC plans to invest $6 billion over the next three years to create a broadband network architecture. GTE plans to essentially do the same. While CLCs argue that Pacific and GTE found there were no direct TELRIC costs when they established price floors for their retail ADSL service, this does not necessarily make it true today. It is not unreasonable to consider whether TELRIC calculated today based on a system that is to provide all customers' needs for data, voice and video products may find some costs (e.g., direct, joint, common) for services other than voice. That is, even if TELRIC costs were caused only by voice in the past, they might be caused by more than voice today. In fact, if transport of data is the future of telecommunications, it may be that xDSL services on the high frequency portion of the local loop cause all future loop costs, and voice services cause none. These questions can and will be resolved at the proper time in appropriate future proceedings, but not here. Given the changing circumstances of telecommunications systems, however, it would be unreasonable to find for purposes of the interim arbitration that zero cost is appropriate for, and no contribution is reasonable to, the local loop related to any TELRIC cost element, including, but not limited to, cost of capital (profit), economic depreciation, and/or joint and common costs.

At the same time, many parties point out that existing rates recover all of an ILEC's costs, including cost of capital, economic depreciation, plus joint and common costs. They claim that ILECs will receive money in excess of their costs if they are allowed to retain additional contribution from these items. These parties are probably right.

As noted above, if profits and rate rebalancing are reasonable issues for the final phase, they will be considered at that time. To facilitate that consideration, Pacific and GTE shall maintain a memorandum account. The memorandum account will track revenues from the monthly recurring charge for access to the high frequency portion of the local loop (i.e., $5.85 for Pacific, $3.00 for GTE). It will also separately track revenues from monthly recurring charges, and non-recurring charges, assessed on any other rate for xDSL service that makes a contribution to joint and common costs. The memorandum account will be subject to interest, either by the application of interest on the balance, or the application of interest on any amounts later subject to true-up adjustment. Pacific and GTE shall report the balance in the memorandum account every three months to the Director of the Telecommunications Division, beginning October 1, 2000.

The Commission shall determine in the final phase of this line sharing matter whether or not any portion of the revenues in the memorandum account are properly allocated to ILEC voice customer ratepayers. For example, if Pacific's $5.85 is eventually reduced to $2.00, then $3.85 will be returned to CLCs with interest, while $2.00 will be considered for retention by the ILEC, or returned to ratepayers with interest. If Pacific's $5.85 is reduced to zero, the entire amount will be returned to CLCs with interest. If, however, Pacific's $5.85 is raised, for example to $6.85, then CLCs will be assessed an additional $1.00 plus interest, and $6.85 will be considered for retention by the ILEC, or returned to ratepayers with interest.

The same shall be true for revenues from the price components of other rate items that contribute to joint and common costs. For example, if a rate element contains a 19% markup for joint and common costs, that amount shall be separately tracked in the memorandum account. The Commission will consider later if this may represent a double recovery of costs, just as it might for the monthly recurring rate for access to the high frequency portion of the loop.

The memorandum account resolves another concern raised by CLCs. CLCs contend that the rate ASI pays Pacific is merely a corporate transfer within SBC. Whatever the rate, CLCs assert there will be no real effect on SBC's final financial results. On the other hand, CLCs argue that all prices paid by CLCs to ILECs are real costs to the CLC, and have a direct, real effect on the CLC's final financial results.

This concern may be valid, even given the specific safeguards and protections created by the FCC in establishing ASI as a separate corporate affiliate. To the extent the concern is valid, returning some or all of the balance in the memorandum account to Pacific's ratepayers produces a real cost to ASI, a real reduction in Pacific's earnings, and a real net reduction in SBC's corporate financial results, equivalent to that which is experienced by CLCs.

The same is true if ASI is never authorized, and for GTE if GTE provides xDSL service itself and not through a corporate affiliate. That is, revenues from the amounts paid by xDSL customers of an ILEC to the ILEC for access to the loop (e.g., $5.85, and $3.00) shall be recorded in the memorandum account. It shall also separately record the revenues of other rate elements that contribute to joint and common costs (e.g., 19% markup). These amounts will later be considered for retention by the ILEC, or for refund to the ILEC voice customer ratepayers.

This memorandum account, and the treatment described herein, shall be subject to limited exogenous factor treatment under the CPUC's new regulatory framework program for Pacific and GTE. (See D.98-10-026, *mimeo.*, pages 61-63, and ordering paragraphs 1(g) and 1(h).)

6.23. Issue 23: What price should CLCs pay for cross-connect tie cables provided by ILEC in order to provide line sharing?

CLCs and Pacific agree the interim rate should be $0.44 per line per month. This is adopted. Parties disagree on the number of tie cables in an ILEC-owned splitter environment. Covad recommends this be determined in the final phase. Covad's recommendation is adopted.

CLCs and GTE disagree on the price. GTE recommends the current tariff rate for collocation tie cables. GTE says that this rate has been adopted in a lawful and approved FCC tariff, and in GTE's widely-used ICAs (the ICAs between AT&T/GTE and MCI/GTE). GTE states that it is a collocation rate, not a rate unique to line sharing, and is, therefore, not subject to refund.

CLCs recommend rejecting GTE's rates because they are not TELRIC-based prices, have been rejected by the Commission as not TELRIC-based, and are subject to continuing litigation. If the CPUC does not adopt CLCs recommended rates, CLCs recommend, in the alternative, using Pacific's rates as a proxy for GTE. As a last resort, CLCs say if the CPUC uses GTE's proposed rates, they must be subject to refund.

GTE's proposed rate is adopted ($2.10 per jumper, Exhibit 251), subject to refund. It does not matter that it is a collocation rate in an approved FCC tariff, or in approved ICAs. All rates in this interim arbitration are subject to later adjustment. The interval for installation and provisioning of tie cables is a collocation matter (Issue 17), but all prices in the interim arbitration are subject to true-up.

The tie cable rates are subject to continuing litigation at the CPUC. The Pacific rate should not be adopted as a proxy for GTE, since there is no reason to find Pacific's and GTE's costs are the same for this element. Since they are subject to adjustment and subject to continuing litigation, GTE's proposed rates are adopted for the interim. Just as with Pacific, the number of tie cables in an ILEC-owned splitter environment for GTE may be resolved in the final phase.

New Edge and GTE point out that some parties currently pay contract-based rates for tie cables that are lower than the tariff-based rates adopted here. GTE says that CLCs with existing ICAs should be entitled to the lower rates contained in the existing ICAs. GTE's position is adopted. That is, rates in existing ICAs for tie cables shall be honored, but, just as with all rates in this interim arbitration, these rates are subject to later adjustment.

6.24. <u>Issue 24</u>: Who should pay, ILEC or the CLC purchasing line sharing, for the cable that carries voice traffic from the CLC's splitter back to ILEC's main distribution frame (MDF)?

CLCs argue that ILECs seek excessive prices, and require too many cables. CLCs assert that ILECs should pay for the cable that carries the voice traffic from the CLC's splitter back to the ILEC's MDF. CLCs say that ILECs always need a facility such as a tie cable to link their voice-grade service customer to the ILEC switch. According to CLCs, this is true regardless of the specific line sharing arrangement, and even for voice only service when no line sharing exists. CLCs contend that the CPUC should not allow ILECs to assign the cost of the existing facility to a CLC merely because the service is reconfigured for line sharing.

To the contrary, because the service is reconfigured, different lines are required, and costs are incurred. The FCC recognizes that this cost can be recovered in rates:

> "If the splitter is not located within the incumbent LEC's MDF, however, then we would expect the states to allow the incumbent LEC to adjust the charge for cross connecting the competitive LEC's xDSL equipment to the incumbent LECs' facilities to reflect any cost differences arising from the different location of the splitter, compared to the MDF." (FCC Line Sharing Order, ¶ 145.)

ILECs are not required to locate CLC splitters in ILEC-owned central office space, or on the ILEC-owned MDF. If the CLC owns the splitter, and the splitter is located in the CLC's collocation area, additional lines are needed. This cost is caused by the CLC, and should be paid by the CLC. ILECs' position is adopted.

ILECs present compelling evidence that more than one additional line is needed. CLCs argue that the four lines required by Pacific and GTE for splitters placed in the ILEC's space is inefficient. CLCs say that the cost for four lines exceeds the FCC's requirement that the cost be only minimally higher than for cross-connecting a splitter located within the MDF. To the contrary, ILECs demonstrate that these lines are needed, and are caused by the line sharing arrangement with the CLC. Therefore, the CLC must pay for these lines, and for the number of lines that are needed in each case.

6.25. <u>Issue 25</u>: What non-recurring charges should a CLC pay for processing service orders and installing jumpers?

Parties generally agree on the use of costs from D.98-12-079, and relevant staff workpapers. CLCs in particular recommend using only relevant components. Prices here, as all interim prices, are subject to later adjustment. Prices proposed by Pacific and GTE are reasonable, and are adopted.

CLCs recommend the CPUC explicitly limit the number of jumpers to the number required in an efficient configuration. CLCs say this is one jumper to connect the incoming loop to the tie cable leading to the splitter (if the splitter is in the collocation space) or to the splitter itself (if the splitter is in ILEC-controlled space). To the contrary, CLCs fail to show that ILECs' configuration is inefficient. (See Issue 24.) No limitation is adopted here.

6.26. Issue 26: What recurring price should CLCs pay for modification of OSS systems used by CLCs in conjunction with line sharing?

CLCs argue that Pacific fails to meet its burden of proof, and the rate should be zero. To the contrary, Pacific's rate is based on a price quote from a vendor to upgrade OSS to accommodate line sharing, amortized by Pacific over a reasonable period of time (three years). It is purely an incremental cost for this specific item. Pacific's recurring price is adopted.

The FCC approves of the recovery of these costs through recurring charges:

> "We find that incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element…We also reaffirm the conclusions in the *Local Competition First Report and Order*, that the states may require incumbent LECs in an arbitrated agreement to recover such nonrecurring costs such as these incremental OSS modification costs through recurring charges over a reasonable period of time." (FCC Line Sharing Order, ¶144.)

CLCs argue that Pacific failed to justify its cost. To the contrary, Pacific sufficiently justified its cost for the purpose of establishing an interim charge. All interim rates are subject to later adjustment. CLCs and other parties may present contrary evidence, or further challenge Pacific's estimate, in the final portion of the line sharing phase of this proceeding, when final prices are established.

CLCs contend that the CPUC has already determined that ILECs should recover local competition implementation costs by a charge to all end-users, not by a charge on UNEs. CLCs cite D.98-11-066 in support:

> "'[i]n D96-03-020 [sic], we also concluded that since the general body of telephone customers as a whole benefits from the implementation of competition, it is not unreasonable that end-users be charged for such costs.'"[34]

To the contrary, Pacific correctly points out that this proposition may apply to network elements used to provide basic telephone service, but does not apply here. OSS is being developed here to facilitate the provision of xDSL services by CLCs. Not all ratepayers will use xDSL service. Only those who use xDSL service should pay the costs associated with that service.

CLCs argue that all OSS-related implementation costs should be addressed in R.95-04-043 / I.95-04-044 (Local Competition docket) and not here. This argument is not convincing, since charges incremental to line sharing should be addressed here, in the line sharing proceeding. Final rates may be influenced by the results of the Local Competition proceeding, and CLCs may present evidence and arguments in the later phase when final line sharing rates are set.

GTE says that the FCC Line Sharing Order provides for this charge (as noted above), but GTE has not had the opportunity to develop one. GTE proposes no charge be assessed in the interim, but that the issue be deferred to

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[34] CLC Opening Brief at page 65, citing D.98-11-066 at page 23.

the final phase, with rates subject to true-up. GTE's position is adopted. Since Pacific's rate is not large, no rate will be imputed for GTE in the interim. Any error in this rate would appear not to cause a significant difference between interim and final rates, and will not cause a large adjustment.

6.27. Issue 27: Should a CLC be able to pay the price associated with a mechanized OSS system, even if a mechanized system is not available?

CLCs propose that CLCs pay the price associated with a mechanized OSS system, even if one is not available. In support, CLCs say the price for a manual system is many times that of the fully mechanized system (e.g., $46.12 versus $0.13 for GTE). CLCs contend that TELRIC prices are forward looking, and must be based on a fully mechanized system, which all efficient utilities are installing. To do otherwise would provide an incentive for ILECs to delay implementation of the fully mechanized system in order to receive more money, according to CLCs.

CLCs' position is not adopted. Pacific expects to have a fully mechanized ordering system by May 29, 2000. The issue for Pacific is largely moot, since most, if not all, CLCs will use, and pay the price of, the mechanized system. A CLC should pay Pacific for semi-mechanized or manual ordering only if the CLC is incapable of using a mechanized system, or elects not to use the mechanized system.

It is appropriate for a CLC to pay the price for the semi-mechanized, or manual, system if Pacific must use other than the mechanized system. Pacific incurs actual costs for those systems, and it is equitable and reasonable for the CLC to pay the actual costs they cause to be incurred.

The same is true for GTE. That is, actual costs are incurred by GTE. It is equitable and reasonable for the CLC to pay the actual costs that are incurred.

CLCs point out that GTE does not have a mechanized system, and that it would be unfair to require CLCs to pay the higher costs when the cause is due to GTE, not the CLC. Further, CLCs say it gives GTE the wrong incentive to allow GTE to charge the higher price.

To the contrary, no compelling evidence is presented here that GTE will not implement a fully mechanized system in a reasonable amount of time. GTE is working to that end. Actual costs are incurred by GTE in the mean time, and should be paid by CLCs. No evidence compels a finding here that GTE would have a disincentive to implement a fully mechanized system due to near term payments at the higher rates.

The rates here are interim and subject to adjustment. Whether or not the rates should be based on a fully mechanized system to be consistent with TELRIC can be decided in the final phase when permanent prices are established.

At the same time, however, CLCs present compelling evidence that the rates proposed by Pacific and GTE for semi-manual and manual systems should be reduced by 50%. CLCs' proposal to reduce the ILECs' proposed rates for semi-manual and manual systems by 50% is adopted. As CLCs say, this should help minimize the magnitude of the eventual true-up.

Pacific asserts that OSS charges relate only to the generation of a service order, not to the non-recurring connection charges for a splitter or loop used by CLCs to justify their proposed 50% reduction. As such, Pacific says the 50% reduction is in error. Rather, Pacific contends that the tasks to complete a semi-mechanized or manual order are no different whether Pacific is establishing a complete UNE loop or line sharing.

At the same time, there is sufficient uncertainty here about the eventual actual cost based on a TELRIC calculation. The uncertainty does not tip the balance in favor of adopting a mechanized rate in all cases now, but it does support adoption of the 50% reduction to the ILECs' recommended semi-mechanized and manual order rates. This will minimize the magnitude of the eventual true-up, if any.

Covad recommends that GTE be ordered to complete a fully mechanized system within a limited, specific amount of time. Covad suggests, for example, adopting either one final deadline of six months from the date of the final Commission decision, or a multi-stage schedule. Covad cites an FCC order showing that one state Commission set a deadline of 3 months after its order, and two other state Commissions ordered either immediate implementation or the submission of a plan with specific deadlines.

The evidence is not convincing that GTE will fail to complete a fully mechanized system in a reasonable amount of time. Nonetheless, there is sufficient question about when GTE will accomplish this to require GTE to provide this information. Therefore, within 30 days of the date of the FAR, GTE shall file and serve a report. The report shall state what systems GTE is developing for full automation of OSS, along with GTE's planned dates for completion. This may be used in the final phase of this matter to set specific deadlines, if warranted.

6.28. Issue 28: Should ILECs be allowed to charge for conditioning (or sometimes referred to as "deconditioning") a loop to provide line sharing and, if so, what should that charge be?

CLCs recommend that ILECs not be allowed to charge for conditioning a loop. This recommendation is not adopted.

Some lines contain limiting devices, such as load coils, repeaters, or bridge taps. These devices were often put on lines to improve the quality of voice service, but they must be removed before xDSL service can begin. If they are on the line, an ILEC must send a technician to physically detach these devices before a CLC may use the high frequency portion of the loop to provision xDSL service. Actual costs are incurred which would not occur but for line sharing. The CLC should pay those costs since the CLC who is requesting line sharing causes those costs to be incurred.

The FCC allows an ILEC to charge for conditioning, but only to a certain level.

> "Finally, consistent with our conclusion in the *Local Competition Third Report and Order*, we conclude that incumbent LECs should be able to charge for conditioning loops when competitors request the high frequency portion of the loop. The conditioning charges for shared lines, however, should never exceed the charges incumbent LECs are permitted to recover for similar conditioning on stand-alone loops for xDSL services." (FCC Line Sharing Order, ¶ 87.)

At the same time, the CLC may decline to have the line conditioned:

> "Accordingly, we conclude that if the incumbent LEC seeks compensation from the requesting carrier for line conditioning activities, or such activity will cause substantial loop provisioning delays, the requesting carrier has the option of refusing, in whole, or in part, to have the line conditioned." (FCC Line Sharing Order, ¶ 87.)

The FCC's rules codify that the ILEC may charge for conditioning, but that the CLC may decline to have the line conditioned:

> "If the incumbent LEC seeks compensation from the requesting carrier for line conditioning, the requesting carrier has the option of refusing, in whole, or in part, to have the line conditioned…" (47 C.F.R 51.319(h)(5)(i).)

It is clear that an ILEC may charge for conditioning.

The CPUC has established a conditioning rate for all 2-wire loops used to provide DSL service in Pacific's territory. Until final TELRIC-based prices are set for loop conditioning, it is set at the level of the non-recurring charge applicable to ISDN loops, or $18.55. (Pacific Opening Brief at pages 54-55, citing D.99-11-050, page 113.) It is reasonable to adopt that rate here, pending adjustment when final rates are set. Pacific's language is adopted, including no conditioning charges for loops under 12,000 feet. (See Appendix DSL, Section 6.3.1.)

CLCs say that the ISDN non-recurring charge includes the cost of installing the ISDN loop. CLCs point out that the CPUC-adopted non-recurring charges for ISDN and basic voice-grade loops differ by only one cent. CLCs conclude that the CPUC has, therefore, found no forward-looking conditioning charges applicable to xDSL-capable loops because the installation costs for the two loops are comparable.

To the contrary, whether or not the result of the particular subtraction is one cent, the cost for conditioning is not one cent. Rather, actual costs are incurred for conditioning. These costs should be paid by CLCs as proposed by ILECs.

CLCs contend that TELRIC requires rates be based on a least-cost, forward-looking, most efficient network design. According to CLCs, such a network today does not have load coils, or other limiting devices, and the price should, therefore, be zero.

This argument is not convincing. It ignores the benchmark set by the FCC of the amount ILECs are permitted to recover for similar conditioning on stand-alone loops for xDSL services. If they choose, however, CLCs may pursue this argument in the final phase when permanent prices are set.

Covad says Pacific is seeking to add a conditioning charge of $18.55 on top of $16.38 and $19.99 for CLC-owned and ILEC-owned splitter options, respectively. Covad asks that the charge be limited to $18.55.

Covad's argument is not convincing. Pacific will be allowed here to assess all adopted charges. In some cases, adopted charges total more than $18.55. If found excessive in the final phase, the excess will be refunded.

CLCs also recommend that the CPUC reject Pacific's proposed conditioning charges for loops over 17,500 feet because they are non-specific. Rather, Pacific proposes that they are to be determined on an individual case basis. CLCs are right. The rates adopted here are to be specific, and not subject to individual calculation. Pacific will assess the same rate for conditioning all loops, whether under or over 17,500 feet.

GTE proposes to charge a monthly recurring rate of $1.50 per line. This is the Type C conditioning rate in GTE's current federal special access tariff. This rate is reasonable for the interim, and is adopted.

An ILEC must condition loops to enable CLCs to access the high frequency portion of the loop. (47 C.F.R 51.319(h)(5)(i).) If conditioning will significantly degrade voiceband services, the ILEC must either (1) migrate the customer to another xDSL capable loop or (2) make a showing to the state Commission that the original loop cannot be conditioned without significantly degrading voiceband services, and that no adjacent or alternative loop is available that is xDSL capable. (47 C.F.R 51.319(h)(5)(ii).)

GTE proposes to establish a loss standard of 8.0 db at 1 kilohertz as its affirmative showing of such loss. This is reasonable. It is the standard GTE has long used in its own network administration as an acceptable level of loss, and guides GTE as to when conditioning is required to improve voice service. It clearly establishes a standard, and will minimize individual disputes. It avoids CPUC involvement on a case-by-case basis. Further, GTE's proposed amendment reflects its obligation to determine if alternative loops exist where conditioning is impractical. (See Issue 11 regarding line and station transfers.) GTE's recommendation is reasonable and is adopted.

6.29. <u>Issue 29</u>: Should DAML be removed as part of line conditioning?

Digital Added Main Line (DAML) devices are pieces of equipment placed in the distribution portion of the loop to derive two or more voice-grade POTS circuits from a single copper loop. CLCs assert that DAML devices must be removed. According to CLCs, removal of DAMLs is a requirement for a clean copper loop, which, CLCs say, ILECs are obligated to provide. The CLC position is adopted in part.

The FCC Line Sharing Order requires removal of interfering devices to enable a loop to be used for line sharing when doing so will not cause degradation of the voiceband service already on the line. Removing a DAML device always degrades service because it eliminates service. The FCC did not mandate conditioning when it would degrade or eliminate voice service.

GTE objects to DAML removal because it would require GTE to place additional copper facilities at great cost to continue voice service. As CLCs point out, however, this is not necessarily the case. End-users who currently have two lines in service due to a DAML, and who request a line sharing arrangement that requires the removal of the DAML, are knowingly trading the second voice grade line made possible by the DAML for the greater bandwidth made possible by the xDSL service. GTE states in its Reply Brief that it is willing to remove DAMLs in this case. That is, where the DAML-created lines serve one customer and that customer chooses to give up the extra lines, GTE will remove the DAML.

This is reasonable. As such, removal of a DAML device shall be required when it affects only one customer, and the customer agrees. The CLC will pay the appropriate conditioning charge.

CLCs also seek DAML removal when more than one customer is involved. This will not be adopted. Rather, ILECs at this time still have a public utility obligation. Even if all customers agree to DAML removal when multiple customers are involved, one or more customers will lose POTS when the DAML is removed. Interfering devices must be removed only when doing so will not cause degradation of the voiceband service. DAML removal here will cause degradation. The remedy would be for the ILEC to incur additional cost to lay a new copper line to serve the customer or customers who lost POTS. This will not be ordered here. Rather, DAML removal shall be required when it affects only one customer, and the customer agrees.

Pacific states that it is currently analyzing a nondiscriminatory policy on DAML, and will make that policy available to CLCs as soon as possible. It is not reasonable, however, to leave this issue unresolved. GTE articulates a reasonable policy, which is adopted. Therefore, Pacific shall adopt the same provisions. If Pacific seeks to develop additional policy, Pacific shall file and serve its additional, nondiscriminatory policy in this proceeding within 30 days.

6.30. Issue 30: If an ILEC owns the splitter and leases splitter functionality, what price should the ILEC charge?

CLCs' final recommended rate is developed using Pacific's proposed capital cost plus installation and maintenance expenses. ILECs use similar bases, but apply different factors.

CLCs argue that ILECs overstate their estimates by using excessive cables and jumpers, an unreasonable fill factor, an unreasonable rounding up of the results, and an excessive annual operating expense factor. ILECs present reasonable estimates, however, and CLCs fail to present convincing evidence and argument to the contrary. For example, CLCs' showing is not compelling that ILECs' cable and jumper configuration is inefficient. (See Issues 24 and 25.)

The fill factor is reasonable in the interim, since it recognizes CLCs will be attracting new customers as xDSL service is rolled out. CLCs request that ILECs provide splitter capacity on demand, and ILECs are voluntarily installing splitters in advance of expected use. Splitters will likely not be fully used at first. A 90% fill factor, as recommended by CLCs, more likely represents fully used central office equipment after years of experience. Further, a 90% fill factor approaches a trigger to add new equipment, and is too high for the interim. At least in the interim, it is reasonable to use a fill factor that more nearly reflects the facts of this new market.

GTE's rounding up is reasonable because it recognizes line testing and repair costs that are not otherwise taken into account. Further, the rounding is a modest amount of $0.47. Even if reversed with final prices, this is not an excessive amount, and will not result in an excessive balance for later adjustment.

CLCs contend splitters are passive devices and cause minimal operating expenses. Pacific's annual operating expense factor is based on operating expenses associated with a passive device, and is reasonable.

CLCs proposed prices fail to take account of these factors. On balance, ILEC rates are more reasonable.

Pacific does not base it price on TELRIC. Rather, Pacific says the splitter is not a UNE, and that Pacific is voluntarily providing splitter functionality as a service to CLCs. As a result, Pacific says its price is based on total service long run incremental cost (TSLRIC).

Pacific is right that it is not obligated to provide the splitter. (See Issue 4.) This may or may not, however, properly allow Pacific to base its rate on a methodology other than TELRIC. Pacific does not present its splitter estimate based on TELRIC to show how much more or less it is than TSLRIC. There is no basis to assume that the difference is a large amount. Whether Pacific's splitter price should be based on TELRIC or TSLRIC can be resolved in the final phase. For the interim, Pacific's price is reasonable, and is not expected to create a large balance for later adjustment, if an adjustment is found necessary. Similarly, GTE's price is reasonable in the interim. ILECs' proposals are adopted on this issue.

6.31. Issue 31: Should CLCs pay for the ILEC to determine whether a loop desired for line sharing is capable of providing DSL and, if so, what should that charge be?

ILECs propose to charge for loop qualification. Pacific states that it must perform work to research loop characteristics in order to determine whether a loop is capable of allowing the CLC to provide xDSL service. Pacific says the CLC causes this work, and should pay the cost. Pacific proposes a rate of $18.25 per loop. GTE says its price is under development, but a price should be adopted in the final portion of this line sharing phase of these proceedings. ILECs' position is not adopted.

ILECs must provide CLCs with access to loop makeup information. (See Issue 8.) That access must be to all information, including "back office" information. The CLC will then make its own determination whether a loop is or is not "qualified" for xDSL service. The ILEC need make no determination whether a loop is or is not qualified. In fact, CLCs and ILECs might disagree whether a line is or is not qualified. This might occur because a CLC may offer a DSL service that differs from that offered by the ILEC, and each service might allow for different line qualifications. Therefore, ILECs should simply provide information to CLCs, should not themselves determine if a line is or is not qualified for a CLC's use, and should not assess a charge.

The one exception is if the CLC asks the ILEC to make that determination, and report the results to the CLC. That is, if the CLC does not simply ask for and receive data, but the CLC asks the ILEC to make a judgment whether or not the line is qualified, and report that judgment to the CLC, then the ILEC may assess a charge. In that case, Pacific may assess its proposed charge, and GTE may propose a charge in the final phase of this proceeding. In the interim, absent a CLC request for a judgment, neither Pacific nor GTE shall apply a charge.

GTE cites the FCC Line Sharing Order in support of a line qualification charge. GTE says the Line Sharing Order allows ILECs to "'recover reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element.'" (GTE Opening Brief, page 72, citing FCC Line Sharing Order, ¶ 144.) To the contrary, these costs are recovered as part of OSS, not as a line qualification charge. (See Issue 26.)

Pacific makes an argument similar to that of GTE. Pacific contends that it does not propose to charge for evaluation of loop makeup information, despite the perhaps poorly chosen description for this item. Rather, Pacific says it seeks only to recover Pacific's costs for work required to provide the requested loop makeup information (e.g., data on load coils, repeaters, bridge taps).

Pacific's argument is not convincing. These costs are recovered as part of OSS. (See Issue 26.) As Covad says, Pacific presents no compelling evidence or argument that different costs are involved here, and there is insufficient record to conclude they are not recovered in OSS charges.

D. General Terms And Conditions: Issues 32 – 38

6.32. <u>Issue 32</u>: What is the scope of interpretation to be applied to the Line Sharing amendments to the existing interconnection agreements?

ILECs seek an interpretation consistent with that of the underlying ICA. CLCs seek a broad interpretation to favor deployment of line sharing by CLCs. ILECs' proposal is adopted.

CLCs argue that by its Line Sharing Order, the FCC seeks to foster the widespread use of line sharing by CLCs to spread the deployment and offering of advanced services to additional markets, particularly residential and small business customers. CLCs propose a clause in the line sharing amendment to capture the spirit of the FCC Line Sharing Order. CLCs assert it is important that all parties understand the spirit into which the agreements are entered, particularly since the agreements arbitrated here will likely be among the first comprehensive line sharing amendments. CLCs say any future dispute must ultimately look first to the language of the amendment itself for a resolution. In light of the newness of the amendment, however, CLCs propose that, in the event of a dispute, parties should agree in the amendment itself that any interpretation should be broadly construed to favor deployment of line sharing by CLCs.

The CLCs proposal is rejected. It is one-sided, and unjustifiably favors the CLCs. The FCC Line Sharing Order is designed to promote rapid access to the high frequency portion of the loop, but "in an equitable manner that balances the needs of both potential competitors and incumbent LECs." (FCC Line Sharing Order, ¶ 5.)

One reasonable goal of contract drafting is to create an agreement that accurately expresses the intended rights and obligations of the parties in definite and certain terms. Framing the scope of an amendment so that parties agree to interpret, implement and apply the provisions of the amendment broadly, as recommended by CLCs, will lead to uncertainty and invite litigation. To the extent possible, uncertainty and wasteful litigation should be avoided. The proposal of the CLCs would invite uncertainty and wasteful litigation, and is rejected.

6.33. Issue 33: What technologies may ILEC deploy, when new technologies (such as fiber) may impact CLCs' provision of xDSL Service?

ILECs say they are not, and should not be, restrained in deploying new technologies which may impact CLCs' provisioning of xDSL service. CLCs propose that ILECs not be allowed to deploy any technologies that impact their provisioning of service. ILECs' position is adopted.

The FCC Line Sharing Order is clear on this point:

"Line Sharing Does Not Impede Incumbent LECs' Ability to Manage the Loop Plant. We are not persuaded by incumbent LEC claims that they would be unable to manage properly their loop plant if required to provide unbundled access to the high frequency portion of the loop. [footnote omitted.] When an incumbent LEC upgrades its loop plant from copper to fiber, the incumbent LEC rarely removes the existing copper, but instead lays the fiber along the existing copper routes. [footnote omitted.] We believe that this practice allows the incumbent LEC to upgrade its plant by laying fiber, while allowing the competitive LEC to retain access to copper loops, including line-shared loops, they are currently leasing from the incumbents to offer xDSL-based services to end-users. **We do not intend, however, to prevent incumbent LECs from constructing new facilities or decommissioning old facilities. We note that the incumbent LEC is not restrained, in the course of normal loop plant maintenance and improvement activities, from migrating customers from copper to fiber loop facilities.** Where such activity takes place, however, the competitor may be required to forego access to only the high frequency portion of the loop serving that customer, and may have to obtain access to the entire unbundled copper loop or find another alternative to maintain service. [footnote omitted.] We expect that incumbent and competitive LECs will be able to resolve these issues in the course of section 252 arbitration and negotiation proceedings. [footnote omitted.] We also note that the Commission has previously defined the specific rights and responsibilities of each party in similar situations. [footnote omitted.] Moreover, the retail xDSL service currently being offered by the incumbents themselves requires the same loop plant that CLECs require to offer shared line xDSL. Accordingly, we believe that the spectrum unbundling requirements we establish in this Order will not infringe the incumbents' ability to rearrange or replace their loop plant in an equitable and pro-competitive manner." (FCC Line Sharing Order, ¶ 80, emphasis added.)

That is, ILECs are not prevented from constructing new facilities, and are not restrained from migrating customers to that new technology. This arbitration will not adopt any such prevention or restraint. ILECs are not, and will not be, restricted in their deployment of any new technology. ILECs are not, and will not be, required to obtain the prior written consent of the CLC before migrating an end-user who is presently receiving CLC data services.

At the same time, the FCC makes clear that it understands the ILEC rarely removes the existing copper when it upgrades it plant. In such cases, the ILEC must immediately make the entire copper loop available to the CLC, and make the transfer without interruption to the customer. (See Issues 6, 11, and 20.)

CLCs ask that the ILECs be prevented from unilaterally switching the unbundled loop UNE purchased by the CLC to an element that the CLC does not want (e.g., an entire unbundled loop). This restriction is not adopted here. ILECs, however, must give the CLC notice. Therefore, the same provisions adopted regarding Issue 20 are adopted here. That is, when the ILEC can convert the line to a stand-alone copper loop, the ILEC will automatically change the service from the shared loop high frequency UNE to a stand-alone unbundled loop. This will be done three days after notice to the CLC (or, if GTE elects, no less than three days as the parties cooperate on the transition). Further, the ILEC cannot cause or require any interruption in service to execute the change.

The FCC does not restrict the ILECs ability to decommission old plant. (FCC Line Sharing Order, ¶ 80.) During the interim period, however, until the issue of transport over fiber DLC plant is resolved (i.e., Issue 3), ILECs should not decommission plant when to do so unreasonably terminates a CLC's ability to offer, or to continue to provide, data service. That is, ILECs are not restricted from deploying any new technologies (e.g., fiber), or from migrating customers to new technologies. ILECs, however, shall be restricted from decommissioning the old copper loop when to do so eliminates the CLC's ability to offer, or to continue to provide, xDSL service. For an existing xDSL customer, however, the ILEC is not restricted from decommissioning the copper line if the customer and/or the CLC elect not to purchase and pay for the entire UNE copper loop. On the other hand, if an existing CLC xDSL customer and the CLC elect to pay for the entire UNE copper loop (and thereby to continue DSL service over the existing copper line even when the customer's voice service is transported over a fiber portion of the local loop), the ILEC cannot decommission the copper line until transport over fiber has been resolved consistent with the discussion in Issue 3. This limitation is for the interim period only, and expires unless continued during the subsequent, permanent phase of this line sharing proceeding. The amendments resulting from this arbitration shall contain a clause consistent with this restriction on decommissioning copper plant during the interim period, subject to no restriction unless subsequently continued during the permanent phase of the line sharing proceeding.

Pacific contends that the limitation on its ability to decommission copper lines is contrary to the FCC's Line Sharing Order. In support, Pacific cites the FCC when the FCC says it does "not intend, however, to prevent incumbent LECs from…decommissioning old facilities." (FCC Line Sharing Order, ¶80.) Further, Pacific says that "occasionally, in the normal course of business, it is forced to decommission copper lines when their useful life expires." (Pacific's comments on the DAR, dated May 15, 2000, page 12.) According to Pacific, Project Pronto is an overlay network, with the copper lines remaining in place as long as they can be maintained, and they are economically feasible to maintain. Pacific concludes that the limitation on decommissioning copper local loops should be eliminated.

To the contrary, while it may not have been the FCC's intent to limit ILECs across the nation from decommissioning copper lines, that is the result of this interim arbitration in California. The FCC notes that "states are free to impose additional, pro-competitive requirements consistent with the national framework established in this order." (FCC Line Sharing Order, ¶ 159.) The limitation adopted here is an additional, pro-competitive requirement in California consistent with the FCC's national framework.

The national framework is "to promote the availability of competitive broadband xDSL-based services, especially to residential and small business customers." (FCC Line Sharing Order, ¶ 4.) The interim arbitration record here clearly shows that technology is changing, it is likely to change rapidly in Pacific's area this year, and these changes have an impact on competition. Until the competitive issues are resolved, neither Pacific nor GTE should take actions that unreasonably reduce or harm the availability of competitive broadband xDSL-based services provided by CLCs. ILECs fail to show that it is economically infeasible to maintain copper loops in the interim. Pacific asserts that only "occasionally" is it forced to decommission copper lines. Pacific fails to show that an interim limitation of its "occasional" decommissioning would be unreasonably burdensome.

The CPUC's goal is to promote vigorous and healthy competition on a level playing field in the telecommunications market, where that competition is also reasonable, fair, equitable, and balanced. The interim limitation on decommissioning copper plant furthers that goal.

The limitation reasonably promotes the availability of competitive xDSL service while this market develops, until competitive issues relative to the new technology are resolved. To the extent the limitation is moderately burdensome on ILECs, ILECs will have increased incentive to quickly resolve competitive issues with the new technology. This actually furthers both the national and state framework and goals to promote the availability of competitive broadband xDSL-based services. No showing demonstrates that the burden, if any, is unreasonable.

GTE asks that the limitation be clarified. GTE recommends that decommissioning be defined as taking copper plant out of service, that is, abandoned in place. GTE says this is distinguished from replacing copper with fiber, but using the copper for some other purpose (e.g., "to augment the feeder plant for purposes of serving another geographic area.") (Comments on DAR dated May 15, 2000, page 16.) GTE's clarification is not adopted.

The limitation adopted here is that ILECs shall not remove copper lines when doing so eliminates a CLC's ability to offer, or to continue to provide, xDSL service. Similarly, ILECs will continue to reasonably maintain copper lines so CLCs have the ability to offer, or continue to provide, xDSL service. ILECs may, in the normal course of maintenance and upgrades, reuse existing copper for other purposes, but only if the copper stays in its existing location and continues to be available for use by CLCs (e.g., not if reuse requires removing the copper, and placing it in a different geographic area).

6.34. Issue 34: What documents must ILEC provide CLCs with pertaining to Network Deployment?

CLCs would require that ILECs provide CLCs with copies of all technical specifications and network architecture information. This would include network operating plans, and any draft or final methods and procedures, that may affect a CLC's provisioning of xDSL loops or line sharing.

CLCs request is not adopted. CLCs' proposed amendment is too broad, and potentially encompasses a vast array of information.[35] It includes all specifications and information, including without limitation any Network Operation Plans and any draft Methods and Procedures, regarding any DLC deployment that may impact CLC's provision of services. Literal compliance would unreasonably burden ILECs, and would invite unnecessary and unreasonable conflict. Moreover, CLCs fail to present any compelling legal authority for such a broad and open-ended request for information.

On the other hand, Pacific shows that ILECs must comply with Section 251(c)(5) of the Act and the FCC's implementing regulations.[36] Pacific states that it will provide CLCs with all final technical publications that address line sharing network elements. GTE is involved in a collaborative process with CLCs that yields the necessary information. ILECs' position is compelling, and is adopted.

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[35] CLCs proposed amendment says: "ILEC shall provide CLEC, upon CLEC's request, with copies of **all** technical specifications and network architecture information, including **without limitation any** Network Operation Plans and **any draft or final** Methods and Procedures, regarding **any** ILEC planned DLC deployment that **may** impact CLEC's provision of **any** of the services, network elements or interconnection components described in this Attachment. For purposes of this ILEC obligation, "planned DLC deployment" **includes, but is not limited to, any** ILEC plans (i) covering the then-subsequent two year period, (ii) included or **referenced** in **any** ILEC filing with the Securities and Exchange Commission; or (iii) included in **any** information provided as a matter of course to ILEC shareholders or other investors (*e.g.*, proxy statements, annual reports)." (Section V.C.1.) (Emphasis added.)

[36] Section 251(c)(5) obligates ILECs to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using the ILEC's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

6.35. Issue 35: Is GTE restricted from migrating customers from copper to fiber loop facilities in the normal course of plant maintenance and improvement?

CLCs recommend that GTE be obligated to first obtain the CLC's approval before GTE can transition any CLC line sharing customer using copper facilities to a fiber-fed line sharing DLC arrangement. The CLCs' recommendation is not adopted.

The FCC Line Sharing Order is clear that an ILEC is not restricted from migrating customers from copper to fiber in the normal course of plant maintenance and improvement: "…the incumbent LEC is not restrained, in the course of normal loop plant maintenance and improvement activities, from migrating customers from copper to fiber loop facilities." (FCC Line Sharing Order, ¶ 80.) CLCs fail to make any compelling argument why the outcome should be any different here.

6.36. Issue 36: Should there be separate liability/indemnity clauses in the line sharing amendments to interconnection agreements, or are the standard clauses found in the interconnection agreements sufficient?

Pacific says separate and distinct liability/indemnity clauses are needed in the line sharing amendments to augment whatever liability/indemnity clauses exist in the underlying ICAs. Pacific claims this is needed in order to address issues specific to xDSL, such as splitter functionality failure. Pacific fails to carry its burden. Pacific claims, but fails to show, that the provisions in the underlying ICAs are inadequate to cover the xDSL case.

Pacific cites to an arbitration of an ICA between Pacific and MFS/WorldCom, in which the Final Arbitrator's Report concludes that separate limitations of liability are appropriate when a particular appendix raises unique issues. Pacific claims, but fails to show, that the issues raised by Appendix DSL are not adequately covered by the liability/indemnity provisions in the underlying ICAs which Appendix DSL amends.

Pacific claims its proposed "language merely indemnifies a party for claims made by the other party's end-users in connection with the provision of splitter functionality." (Pacific Opening Brief, page 60.) To the contrary, Pacific's proposed language goes beyond splitters and includes "non-standard xDSL technologies." (See Appendix DSL, Sections 3.7.1, 3.7.2, and 3.7.3.)

Pacific says that the splitter functionality specific contingency is not covered by the general liability/indemnity language in the underlying ICA. Pacific fails to show, however, that the language in the underlying ICA is so narrow as to exclude this contingency.

GTE asserts that no separate liability or indemnity section for line sharing is required. It is not clear why it is not required for GTE, but would be for Pacific.

CLC's argue that the general liability language in the underlying ICAs is adequate to cover the line sharing area. This is reasonable, and is adopted.

In the spirit of compromise, the CLCs propose liability and indemnity language that would apply if the CLC deploys a non-standard technology. Nonetheless, CLCs' and Pacific's proposed language differs, and there is no compelling reason to adopt either one or the other. CLCs and Pacific fail to present a compelling reason why the language regarding non-standard technology is necessary.

Therefore, CLCs' position that no separate liability/indemnity clauses are needed in the line sharing amendments is adopted.

6.37. Issue 37: What forecast information should be required from CLCs after the initial rollout?

ILECs seek forecasting information by central office. In addition, Pacific would require a penalty if the forecasts are wrong, and GTE would require prior written notice of a CLC's sales promotions.

CLCs believe that forecasts should be by region, not central office. Further, CLCs say that CLCs should not be required to provide forecasts, but CLCs may provide forecasts voluntarily, and should not be required to provide notice of sales promotions.

There is no dispute that forecasts are useful for planning. CLCs fail to provide sufficient reason why non-binding forecasts should not be required. Accordingly, ILECs may require CLCs to provide forecasts, but the forecasts will be non-binding on both the CLCs and the ILECs. Pacific may not assess a penalty. (See Issue 4.)

ILECs may require forecasts by central office, as well as by metropolitan area. CLCs argue that they market services on a metropolitan area basis and have no ability to predict demand with certainty at the central office level. Nonetheless, forecasts must be implemented at the central office level since equipment must be installed in specific central offices to serve specific customers. CLCs are in at least as good a position as an ILEC to disaggregate their demand estimates to the central office level. In fact, CLCs should be in an even better position than the ILEC to do this, since the CLC can reasonably be expected to have more insight into the dispersion of the CLC's prospective customers than would the ILEC. The CLCs input will be helpful to the ILEC, and will serve both parties well. Since the forecasts are non-binding, the CLCs face no penalty if their estimates are incorrect.

CLCs, however, should not be required to provide notice to ILECs of sales promotions. ILECs and CLCs are competitors for xDSL service. While confidentiality and nondisclosure restrictions can be required for the exchange of such information, it is undesirable to require the production of data with complicated restrictions unless it is absolutely necessary.

The demand forecast itself is what is desirable and necessary, not information about promotions. Under adopted procedures, CLCs will update their forecasts every 3 months for GTE (Line Sharing Amendment, Section 2.9), and every six months for Pacific (Appendix DSL, Section 5.1.2.1.1). There is no prohibition, however, against a CLC updating its forecast more often. A CLC can be expected to do this when the CLC believes its forecast is wrong. A CLC will do this because it is in the CLC's best interest to provide accurate information. In this way the ILEC can reasonably meet the CLC's needs. Moreover, it serves to maintain a good business relationship with a long-term business partner.

Thus, advance notice on promotions shall not be required. CLCs shall be required to provide forecasts by central office on a recurring basis, and are encouraged, and expected in their own self-interest, to update forecasts more often when necessary. Forecasts shall be non-binding on both the CLC and the ILEC. Pacific shall not apply a penalty for a CLC failing to meet its forecast.

6.38. Issue 38: Should Pacific be required to notify line sharing CLCs when Pacific changes a POTS number prior to the time the number change is completed?

ASI asks that Pacific be directed to notify CLCs of changes to POTS numbers prior to the time the telephone number change is completed. ASI's request is not adopted.

Pacific says it cannot provide this information to CLCs prior to the time the customer order is completed. A delay is necessary to ensure that the information is accurate. That is, prior to the time an order is completed, it may be modified or cancelled by the customer. Further, the newly assigned telephone number may change prior to the time that the order is completed. Consequently, the report cannot be generated and produced until the order is complete.

Pacific agrees to notify a line sharing CLC after the change order has been completed. Pacific is in the process of developing a procedure for generating a report when a customer's number changes. It is anticipated that this report will be produced daily, and will be provided to the data CLC sharing the line electronically.

The manner in which Pacific will ultimately provide these reports, however, should be communicated through Pacific's Change Management Process. The Change Management Process provides a means by which Pacific notifies CLCs of changes to OSS interfaces, introduces new interfaces, retires interfaces, and provides for the identification and resolution of CLC issues. The Change Management Process is dynamic, managed through regularly scheduled meetings, and based on group consensus.

Therefore, Pacific's position on this issue is adopted.

7. Conclusions on Form of Agreement, Issues, Further Filings, and Issues for the Final Phase

By June 2, 2000, Pacific and GTE shall file and serve contract language consistent with the decisions in this FAR. The contract language shall use Appendix DSL proposed by Pacific, and the Line Sharing Amendment proposed by GTE, modified as ordered herein. Specifically, the contracts shall at a minimum provide as follows, or Pacific and GTE shall file and serve as follows:

A. <u>Form of Appendix and Amendment</u> (FAR Chapter 4):

Pacific's Appendix DSL shall include a clause that the line sharing appendix does not override provisions in an existing CLC's DSL agreement for purposes of DSL provisioning over stand-alone DSL capable loops.

B. <u>Issues</u>

1. Issue 1: Outcome in favor or ILECs.
2. <u>Issue 2</u>: Outcome in favor of ILECs.
3. <u>Issue 3</u>: Outcome in favor of ILECs, except:
   a. Amendments with line sharing or transport over fiber:
      1) Pacific shall file and serve a complete Appendix DLE-DSL, including prices, within 30 days.
      2) GTE shall file and serve a complete appendix comparable to Pacific's Appendix DLE-DSL, including prices, within 90 days.
      3) If jointly acceptable to the ILEC and CLC, the line sharing or transport over fiber appendix may be executed and become effective. Appendices shall not become effective without agreement by ILEC, except subject to (b) and (c) below.

   b. ILECs shall comply without delay with any FCC order that directs line sharing or transport over fiber by further amending Appendix DSL for Pacific and Line Sharing Amendment for GTE.

   c. ILECs shall amend Appendix DSL for Pacific, and Line Sharing Amendment for GTE, no less than 30 days before the first day that the ILEC plans to carry xDSL service over the fiber portion of the local loop for its own customer (or the customer of any corporate affiliate) to provide for line sharing or transport of a CLC's xDSL traffic over fiber under the same terms, conditions and prices as provided by the ILEC to itself or a corporate affiliate, to begin, if requested by the CLC, on the same day service begins to the ILEC's customer or the customer of a corporate affiliate.
4. <u>Issue 4</u>: Outcome in favor of ILECs except:
   a. If ILEC owns the splitter it shall provide the CLC with functionality that is compatible with the transmission technology that the CLC seeks to deploy.

b. Pacific shall not include penalty provisions related to CLC forecasts.

5. Issue 5: Outcome in favor of ILECs, except ILECs shall allow CLCs to provision a dedicated splitter by owning the splitter and leasing it to the ILEC.

6. Issue 6: Outcome in favor of ILECs, except ILECs shall not cause or require an interruption in the CLC's data service (beyond a momentary interruption).

7. Issue 7: Outcome in favor of ILECs, except ILECs shall amend Appendix DSL and Line Sharing Amendment without delay to comply with any FCC order requiring ILECs to provide access to the high frequency portion of the loop as part of a UNE-P. The ILEC amendments shall provide for commencement of service consistent with any date ordered by the FCC. The amendments shall become effective when filed at the CPUC, unless suspended by the Director of the Telecommunications Division.

8. Issue 8: Outcome in favor of CLCs, except ILECs are not directed to implement any electronic interfaces not already in place, and are not directed to provide access to ASOS. Revised language shall not include references to home run copper and fiber-fed DLC, and shall reference access to electronic interfaces only as soon as possible.

9. Issue 9: Outcome in favor of ILECs.

10. Issue 10: Outcome in favor of ILECs.

11. Issue 11: Outcome in favor of ILECs.

12. Issue 12: Outcome in favor of CLCs, with modification to delete references to home run copper.

13. Issue 13: Outcome in favor of CLCs, with modification to delete references to home run copper.

14. Issue 14:

    a. Pacific: Outcome for CLCs, except Pacific shall, as a last resort after attempting to coordinate with the CLC, restore voice service without CLC approval. CLC shall not cannot require 2-hour advance notice.

    b. GTE: Outcome for GTE, with modification to define test head.

15. Issue 15: Outcome for ILECs, except same conditions apply as Issue 3.

16. Issue 16: Outcome for ILECs.

17. Issue 17: Outcome for ILECs.

18. Issue 18: Outcome for ILECs.

19. Issue 19: Outcome for ILECs.

20. Issue 20: Outcome for ILECs, except

    a. Pacific shall modify Section 4.2 to:

        (i) state that Pacific shall convert the line sharing circuit to a full stand-alone UNE at the end of three days absent a request from the CLC to the contrary, and

        (ii) clarify that Pacific shall not cause or require any interruption in service to execute the loop access status change.

    b. GTE shall modify its Amendment to:

        (i) provide an automatic transfer unless notified by the CLC to the contrary to be either (a) or (b) at GTE's choice: (a) 3 days or (b) no less than 3 days while the parties cooperate on a transfer, and

        (ii) clarify that GTE shall not cause or require any interruption in service to execute the loop access status change.

21. Issue 21: Outcome for ILECs.

22. Issue 22: Outcome for Pacific at $5.85. GTE shall adopt a price of $3.00 per line per month for access to the high frequency portion of the copper loop. ILECs shall each maintain a memorandum account which records revenues from the monthly recurring charge for access to the high frequency portion of the local loop (i.e., $5.85 for Pacific, $3.00 for GTE) related to xDSL sales. These revenues shall include those from sales to CLCs, corporate affiliate CLCs, and an ILEC's sales to its own customers. Separately from the recording of access revenues, ILECs shall record revenues from monthly recurring charges, and non-recurring charges, assessed on any other line sharing rate for xDSL service that make a contribution to joint and common costs. The memorandum account shall be subject to interest, either by the application of interest on the balance, or the application of interest on any amounts later subject to true-up adjustment. Pacific and GTE shall report the balance in the memorandum account every three months to the Director of the Telecommunications Division, beginning October 1, 2000.

23. Issue 23:

    a. Pacific: Outcome for Pacific, with number of tie cables to be determined in the final phase.

b. GTE: Outcome for GTE, with number of tie cables to be determined in the final phase, and rate subject to true-up. Rates in existing ICAs shall be used for that particular CLC, with the rate subject to true-up.

24. Issue 24: Outcome for ILECs.

25. Issue 25: Outcome for ILECs.

26. Issue 26: Outcome for ILECs.

27. Issue 27: Outcome for ILECs, subject to:

    a. CLC shall pay semi-mechanized or manual system costs if CLC uses semi-mechanized or manual system even after fully mechanized system is available.

    b. ILEC proposed semi-manual and manual rates shall be reduced by 50%.

    c. Within 30 days of the date of the FAR, GTE shall file and serve a report stating what systems GTE is developing for full automation of OSS, along with GTE's planned dates for completion.

28. Issue 28: Outcome for ILECs, except Pacific shall charge $18.55 (not individual case basis) for loops over 17,500 feet. Pacific shall assess no conditioning charges for loops under 12,000 feet. GTE shall establish a loss standard of 8.0 db at 1 kilohertz as its affirmative showing of such loss.

29. Issue 29: Outcome for CLCs to the extent that language shall be included in Pacific's Appendix DSL and GTE's Line Sharing Amendment that requires DAML removal when removal affects one customer and the customer agrees. ILEC shall be allowed to assess conditioning charges for DAML removal. If different than adopted in Appendix DSL, Pacific shall file and serve its nondiscriminatory DAML policy within 30 days.

30. Issue 30: Outcome for ILECs.

31. Issue 31: Outcome for CLCs, except Pacific may assess its propose rate, and GTE may assess a rate to be determined in the final phase, if CLC asks the ILEC for a determination and judgment regarding whether or not a loop is capable of carrying xDSL service, and ILEC reports that determination and judgment to CLC.

32. Issue 32: Outcome for ILECs.

33. Issue 33: Outcome for ILECs, except ILECs shall not decommission the copper loop when doing so would terminate a CLC's ability to offer, or continue to provide, xDSL service to a customer. ILECs shall reasonably

maintain copper local loops so that CLCs have the ability to offer, or continue to provide, xDSL service. ILECs may, in the normal course of maintenance and upgrades, reuse copper lines for other purposes, but only if the copper loops stay in their existing locations and continue to be available for use by CLCs. The limitation applies until line sharing or transport over fiber has been resolved consistent with Issue 3. This limitation is for the interim period only, and expires unless continued during the final phase.

34. Issue 34: Outcome for ILECs.
35. Issue 35: Outcome for GTE.
36. Issue 36: Outcome for CLCs that no separate liability/indemnity clauses are needed in the line sharing amendments.
37. Issue 37: Outcome for ILECs, subject to forecasts by central office being provided on a recurring schedule, non-binding on either the ILEC or CLC, and not subject to penalty provisions. There shall be no requirement for notice of promotional offerings. CLCs are encouraged to update forecasts as often as necessary.
38. Issue 38: Outcome for Pacific.

The contract language shall be in the form of an appendix or amendment that any competitive local exchange carrier may adopt. Pacific and GTE shall also file and serve signed appendices or amendments to existing ICAs, and newly signed ICAs with appendices or amendments which provide for line sharing. The signed appendices or amendments to existing ICAs, or newly signed ICAs, shall be effective on or before June 6, 2000.

Parties shall also file statements by June 2, 2000. The statements shall indicate whether the appendices, amendments, or agreements should be adopted or rejected by the CPUC.

Whether or not included as a provision of the appendix or amendment, Pacific and GTE shall file and serve the following:

1. Within 30 days of the date of the FAR, Pacific shall file and serve a complete Appendix DLE-DSL.

2. Within 90 days of the date of the FAR, GTE shall file and serve a complete appendix comparable to Pacific's Appendix DLE-DSL.
3. Within 30 days of the date of the FAR, Pacific shall file and serve its nondiscriminatory DAML policy if it is different than as required in Issue 29 of the FAR.
4. Within 30 days of the date of the FAR, GTE shall file and serve a report which shall identify the systems GTE is developing for full automation of OSS, and GTE's planned dates for completion.

The following issues will be addressed in the final phase of this matter:

1. Prices
2. Number of tie cables in an efficient configuration.
3. Whether or not to continue the limitation on decommissioning of copper loop plant pending resolution of line sharing or transport over fiber.

8. Final Appendix DSL and Final Line Sharing Amendment

Parties were unsuccessful in preparing one appendix for Pacific, and one amendment for GTE, that conformed with the outcomes in the DAR. On May 18, 2000, parties filed and served one appendix, and one amendment, with several dueling clauses. The dueling clauses are resolved herein consistently with the outcomes in the FAR. The final Appendix DSL is contained in Attachment C. The final Line Sharing Amendment is contained in Attachment D.

Attachments C and D, however, only resolve the dueling clauses. That is, except for formatting and resolution of dueling clauses, the appendix and amendment are not modified in any other way from those presented by parties on May 18, 2000. Rather, it is understood that parties have agreed to language in all other sections that conform with the decisions in the DAR, and will conform with decisions in the FAR.

Conflicts, if any, (including, but not limited to, typographical errors, formatting errors) between the FAR (including the discussion below) and

Attachments C and D must be resolved by parties bringing the final appendix and amendment into conformance with the FAR by June 2, 2000. For example, parties must conform the final appendix and amendment to the changed dates specified in the FAR, the altered treatment of DAML removal, and any other changes that affect the appendix and attachment.[37]

Moreover, Attachments C and D are not reviewed for tests that must be applied in part or whole to any section or sections, except to the extent dueling clauses are resolved using the tests applied and discussed in the FAR.[38] An explanation of the resolution of dueling clauses follows.

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[37] Changes in the FAR that may or may not require changes in the appendix and amendment include, but are not necessarily limited to:

(a) revised dates in the FAR for compliance with FCC orders on line sharing or transport over fiber, or over UNE-P, as well as transport over fiber by the ILEC of its own customers' traffic (Issues 3 and 7; Pacific Appendix DSL Section 11.3);

(b) ILEC momentary interruption for removal of ILEC-owned splitter if a line is converted to a standalone loop (Issue 6, subject to relief from the FCC, if necessary);

(c) the creation of a memorandum account (Issue 22);

(d) use of tie cable rates in existing GTE / CLC ICAs if less than $2.10 per jumper, subject to later true-up adjustment (Issue 23);

(e) channel connect rates (Issue 27; Pacific Appendix DSL, Pricing Appendix);

(f) limitation of DAML removal to situations with one customer (Issue 29; GTE Line Sharing Amendment Section 2.13); and

(g) limitation on decommissioning and maintenance of existing copper lines (Issue 33).

[38] That is, for example, negotiated outcomes are subject to tests in the Act (e.g., 47 U.S.C. 252 (e)) and CPUC Resolution ALJ-178 (e.g., Rules 4.3 and 2.18). Arbitrated outcomes are subject to tests in the Act (e.g., 47 U.S.C. 252(e)) and CPUC Resolution ALJ-178 (e.g., Rule 4.2).

8.1. Pacific Bell Appendix DSL

8.1.1. Section 1.1: Introduction

CLCs' proposed dueling language exceeds Pacific's proposed resolution of the issue. Pacific's proposed resolution was adopted in the DAR, and is adopted in the FAR. CLCs' language is too broad and ambiguous, and, similar to resolution of Issue 32, would invite uncertainty and litigation. Pacific's dueling language is adopted.

8.1.2. Section 2.10: Definition of "Cooperative Acceptance Testing"

This section was included in Pacific's proposed Appendix DSL. Pacific's proposed Appendix DSL was adopted in the DAR, except as modified by other decisions in the DAR. None of those decisions conflict with adoption of Section 2.10. No decisions in the FAR conflict with adoption of Section 2.10.

Further, the DAR and FAR both adopt CLC proposed clause IX.A.4, titled "cooperative acceptance testing." A definition is appropriate. Therefore, Pacific's dueling language is adopted.

8.1.3. Section 4.2: Charges for Converting to UNE

CLCs are required to pay nonrecurring charges to establish a standalone xDSL-capable loop (in addition to applicable loop recurring charges). Pacific's language is adopted.

8.1.4. Section 4.4: Migrating End Users

ILECs are not restricted from migrating customers (i.e., restrictions apply only to decommissioning and maintenance of copper loop plant during the interim). Pacific's dueling language is adopted.

8.1.5. Section 5.1.2.1: Test Access

CLCs' proposed language was adopted in the DAR, and, as proposed in dueling clauses, conforms most closely with decisions in the FAR. Pacific seeks to include a definition of “test head.” Pacific proposes: “e.g., physical loop test access point at the splitter” (as suggested for GTE in the DAR). CLCs’ proposed language preceding test head states: “physical test access point at the splitter (e.g., a ‘test head’).” CLCs’ proposed language adequately relates test head to test access point at the splitter. CLCs’ dueling language is adopted.

8.1.6. Section 5.1.2.3.1: Splitter Deployment

Forecasts are not binding on ILECs. Pacific only needs to make a good faith effort to meet a non-binding forecast of demand. CLCs’ proposed language would, in conflict with the DAR, make the forecast binding on Pacific, thereby requiring Pacific to meet provisioning intervals. After the initial rating and ranking process, splitter installation is according to collocation provisions, not loop provisioning, since ILECs are not required to own splitters. Pacific’s language is adopted.

CLCs argue in support of their proposed language that “Pacific Bell, as the splitter provider…” (Letter dated May 18, 2000, page 3.) Pacific is not the splitter provider. CLCs contend that Pacific should not expand loop provisioning to over three months by failing to manage splitter capacity. CLCs, however, may install their own splitters. CLCs reargue positions that were not adopted in the DAR. CLCs’ dueling clause language is inconsistent with decisions in the DAR, as well as decisions in the FAR. Pacific’s dueling language is adopted.

8.1.7. Section 6: OSS

This section generally relates to Issues 8, 9, 28, and 31. The outcomes on these issues are largely for CLCs, with limited exceptions. For example, CLCs must have access to all available data, including back office systems, in parity with the information the ILECs have, and use, themselves. There is no loop "qualification" by the ILEC, unless specifically requested by the CLC. On the other hand, Pacific need not provide access to ASOS. ILECs need not develop new electronic interfaces as a result of this arbitration, but must make new electronic interfaces available to CLCs as soon as they are developed and available. Pacific shall not charge for conditioning loops below 12,000 feet.

CLCs seek to replace "make up" with "provisioning." The DAR and FAR specifically find for CLCs regarding their proposed language at Section VIII in their originally proposed amendment. Section VIII used the term "loop make-up information." Parties were invited to begin with the language in Section VIII. "Make-up" was not a disputed term. The expectation in an arbitration is that the prevailing party on an arbitrated issue will not seek further modifications. This is the outcome contemplated in the DAR (i.e., minimal change from the CLCs' original proposal and adopted language).

CLCs argument for change now is not convincing. Further, the term "make-up" is used in the title of Section 6 with the May 18, 2000 proposed Appendix, and the title is not disputed. For consistency, it should be used in other parts of Section 6 of the final agreement.

"Provisioning" was used by CLCs in other parts of their originally proposed agreement (e.g., Section VI dealing with home run copper; and Section IX dealing with provisioning and installation), but not Section VIII, which was adopted in the DAR, and is adopted in the FAR. No convincing argument is made to use provisioning in place of make-up here. Therefore, "make-up" shall be used in the final Appendix DSL.

Where "provisioning" is not used in place of "make-up," however, it is more descriptive, just as CLCs state. In those limited instances, "provisioning" is adopted.

Section 6.3.1 documents Pacific's commitment to perform conditioning on loops under 12,000 feet at no charge to CLCs. This section shall be included.

While the term "fields" is disputed in part, it is included in non-disputed language as well (e.g., last sentence of Section 6.4). The term "fields" is consistent with application of electronic interfaces. No reason is given or obvious why CLCs would accept the term in part, but not in whole.[39] For consistency, and in conformance with electronic interface terminology, the term is adopted.

Pacific's proposals regarding manual and other work are adopted. (Section 6.4.) The adopted language says "should" (e.g., Section 6.4, Section 6.4.2) and "is not limited to the following fields" (Section 6.4.1). CLCs are not limited to the identified data. Rather, it gives both parties an understanding of the data that should be revealed, and will allow the CLC to ask for more if necessary.

Further, Pacific represents that this is simply another option for the CLC, and is not limiting. At the same time, the FAR recognizes differences between manual, semi-manual, and mechanical OSS systems, and it is reasonable to reflect these differences in Section 6. Therefore, Pacific's dueling clauses are adopted.

Section 6.4.1.8 (regarding spare facilities) is adopted. Pacific states it is not loop make-up information, but would be provided under the terms of Section 6.5. Whether or not it is strictly make-up information, Pacific does not

[39] Even if it was an oversight by CLCs, it should now be used consistently in Appendix DSL.

dispute it is subject to being provided. It is sufficiently important that it should be specifically stated. The proposal to include it here is adopted.

The title of Section 6 includes "ordering." Section 6.5 shall refer to all OSS data during the ordering process, including pre-ordering.

8.1.8. Section 8: Loop Acceptance

The dueling clauses here deal with Issues 12 and 13. The DAR and FAR adopt CLCs' proposed Section IX.A.4, subject to conformance with other decisions in the DAR (e.g., deletion of the term "home run copper"). CLCs now seek to include language that was not adopted (e.g., "and provide such results to the CLEC;" also "or an error on Pacific's part"). CLCs' newly proposed language is not adopted.

Pacific is right when it states that original Section IX.A.4 included "trouble ticket." That term, however, is inconsistent with the decision regarding the retention of installation problems with the installers, and not referring installation problems to others by a trouble ticket. Therefore, that language is deleted.

Pacific's language regarding Pacific considering the line accepted if the CLC does not conduct its own testing on or before the CLC requested due date is inconsistent with the decision in both the DAR and the FAR that the CLC must affirmatively accept the line. Pacific's concern about exposure to performance penalties is addressed in the FAR, and, as resolved herein, does not support Pacific's proposal. For mutual efficiency, individual CLCs may agree with Pacific to allow Pacific to consider the loop accepted under various terms and conditions, and/or to administer this provision in any manner to which parties agree. As a general term of the appendix available to all CLCs, however, Pacific's proposed dueling clause language exceeds the decisions in the FAR, and is not adopted.

CLCs seek to delete Pacific's proposed language and charges for acceptance testing. As clarified in the FAR, CLCs are right. Therefore, Sections 8.2 and 8.3 are not included.

Section 8.1, however, contains dueling language regarding one exception. The exception is where the CLC rejects a line but parties later mutually agree the trouble was not related to Pacific's provisioning of the line. In that case, it is consistent with existing access tariffs, and it is reasonable, to require the CLC to pay charges associated with acceptance testing. Pacific may determine the charge at that time, subject to dispute resolution provisions of the ICA. CLCs say Pacific's language here is ambiguous ("all charges associated with provisioning…"), but CLCs are, nonetheless, amenable to paying installation and provisioning charges. While the charges in Section 8.3 are not included in the appendix (because Pacific may not routinely charge for acceptance testing), to the extent CLCs may be amenable to paying those or similar charges, parties should be guided by what Pacific here proposed, and CLCs accepted in principle, if the situation arises. CLCs do not propose specific dueling clause language regarding those charges, however.

CLCs ask that if this charge is adopted (i.e., when Pacific does subsequent testing and both parties agree that any fault on the line was not due to Pacific), then the charge should be reciprocal (e.g., CLC is compensated for testing it performs when Pacific fails to provision the loop properly). It is untimely to raise this proposal at this stage of the arbitration. Moreover, dueling language is not offered on this point. CLCs request is not adopted.

Section 8.2 refers to "rates set forth in Appendix PRICING." Acceptance test rates are not contained in Appendix Pricing. Section 8.2 is not adopted.

8.1.9. Section 9.6.2: End User's Approval

CLCs seek to include language that was not authorized in the DAR, and is not authorized in the FAR. ILECs need not secure the end-user's approval to restore failed voice service after reasonable attempts to coordinate with CLC. CLCs' language is not adopted.

8.1.10. Section 9.6.3.1: Procedures and Access

ILECs' positions were adopted in the DAR, and are adopted in the FAR, on this issue, consistent with parity. Pacific now seeks to limit splitter repair to business days only. Pacific does not point to any record evidence showing that Pacific conducts repairs for its own customers only during business days. Pacific does not show that its originally proposed Appendix DSL contained this limitation. In fact, the original Appendix DSL referred to 24 hours, not 24 hours excluding holidays and weekends. It is untimely for Pacific to raise this issue now. Pacific's language is rejected.

8.1.11. Pricing Appendix: Channel Connect

Charges for channel connects shall not be reduced by 50%. Channel connect charges are for physical work associated with cross-connects, not the service order charges addressed in Issue 27, as clarified in the FAR. The 50% interim reduction in OSS charges relates to potential TELRIC calculations for manual and semi-manual OSS charges. OSS charges reflect three systems (i.e., manual, semi-manual, and mechanized). No record evidence shows that channel connects are a function of manual and semi-manual OSS systems.

8.2. GTE Line Sharing Amendment

When the issues are similar, resolution of dueling clauses for GTE's Line Sharing Amendment is consistent with that for Pacific's Appendix DSL, as discussed above. Resolution of some issues is addressed in the body of the FAR (e.g., GTE discontinuing ILEC-provided splitters, Issue 4). Further, the DAR adopted GTE's form of amendment. As such, GTE's original language prevails over dueling language absent a reason otherwise. Redundant language is not adopted (e.g., that the rates are subject to true-up). Specific language is adopted over general language (e.g., references to specific FCC rules, particularly where the reference provides the data is not limited to that FCC Rule). Other clauses are resolved as follows.

8.2.1. Recitals

Arbitrations are compulsory. (47 U.S.C. 252(b).) No additional language needs to be included to show that GTE was required to enter into the arbitration and the amendment. It is unclear what GTE understands is the "generally accepted understanding" of the term arbitrated "agreement." GTE's proposed language is not adopted.

8.2.2. Section 1.2(a): G.Lite

G.Lite was not included in the GTE amendment adopted in the DAR. CLCs can qualify G.Lite technology under the mechanisms allowed by the FCC.

Parties reference Issue 4. Issue 4 notes that the FCC requires that, if an ILEC provides the splitter, the ILEC must provide loop and splitter functionality that is compatible with the transmission technology the CLC seeks to deploy. CLCs, however, may only deploy a technology that is presumed to be deployable pursuant to FCC Rule 51.230. (47 F.C.R. 51.319(h)(4).) The interim arbitration record does not show whether or not G.Lite is presumed to be deployable under FCC rules.

8.2.3. Section 1.2(b): Three Days

CLCs seek to extend the number of days by which GTE must notify CLCs of a termination of voice service. The DAR provided that GTE could select the number of days. GTE selected 3 days, consistent with the number of days proposed by, and adopted for, Pacific. GTE's dueling language is adopted, with one exception. The exception is that GTE must provide notice before the discontinuance, not concurrent with, or after, the termination. Notice before the termination is consistent with the decisions in both the DAR and FAR.

8.2.4. Section 1.2(c) and (d): Decommissioning

CLCs propose language that was rejected in the DAR. For example, CLCs initially proposed that GTE be obligated to obtain the end-user's consent before migration to fiber. CLCs did not prevail. (Issue 35.) Nonetheless, CLCs propose that condition in their dueling clause. Further, CLCs' proposal of a five-day notice is rejected. (See discussion above.) CLCs also propose language that is beyond the issues presented during, and decided in, this arbitration (e.g., 30 business days' notice). GTE's dueling language is adopted.

8.2.5. Sections 1.5 and 2.2: Further Assurances and Fiber-Fed DLC

The DAR adopted GTE's form of amendment. Parties cite Issues 3, 8, and 34 regarding their dueling language. The outcomes of those three issues support GTE's proposed language.

8.2.6. Section 2.9: Provisioning

Parity was adopted. CLCs' proposed dueling clause is inconsistent with parity, and is not adopted.

8.2.7. Section 2.10: DAML

CLCs propose dueling language that is consistent with the decision regarding DAML removal. CLCs' language is adopted. CLC's adopted language in turn refers to Section 2.13. Section 2.13 must be changed to conform with the limitation of DAML removal to situations regarding one customer. (See Issue 29.)

8.2.8. Section 2.11(a): Access for Testing, Repair, and Maintenance

CLCs' proposed language is more consistent with the outcomes of Issues 14 and 15, and is adopted.

8.2.9. Section 2.11(c): Permission and Information

ILECs are not required to obtain the permission of the end-user to restore voice service after attempting reasonable coordination with the CLC. (See outcome of Issue 14.) GTE's language is adopted.

CLCs seek to include language limiting their liability (e.g., heart monitor data) to services "of which it [the CLC] is aware." This language was not in GTE's original form of amendment, as adopted in the DAR. Further, the DAR finds for CLCs that individual liability / indemnity clauses are not needed in line sharing amendments. This outcome is also in the FAR. Moreover, it is reasonable that CLCs should seek information from customers about life safety matters if CLCs' service (or interruption thereof) might be critical. GTE's proposed language is more consistent with the arbitrated outcomes than is CLCs' proposed language. GTE's proposed language is reasonable, and is adopted.

8.2.10. Section 2.12: Burglar Alarm Systems

Dueling clauses are resolved in favor of the original language proposed by GTE, and adopted in the DAR, with one exception. The DAR finds that no individual liability / indemnity clauses need to be included in line sharing amendments. The FAR reaches this same outcome. CLCs' proposal regarding deletion of specific liability / indemnity clause is adopted.

8.2.11. Section 3.1: Interim Pricing

CLCs propose including "GTE asserts that" before "GTE's interim pricing proposal does not reflect all the costs…" This statement is consistent with GTE's position, and does not limit GTE's potential future remedies. CLCs' proposal is adopted. Inclusion of "alleged," however, is redundant, and is not adopted.

GTE proposes further listing of cost items as examples ("costs associated with OSS-related implementation costs, DAML removal"). This proposal provides added specificity. At the same time it does not insure that GTE will receive any additional cost recovery, or that CLCs will pay disputed costs related to those items. GTE's proposal is adopted.

8.2.12. Section 4: Effective Date

The line sharing amendment amends an underlying agreement. The amendment should be effective over the same period of time as that agreement. GTE's proposed language is adopted.

The CLCs' proposed language goes beyond matters arbitrated in this interim arbitration. GTE, however, is under FCC and CPUC orders to provide line sharing services pursuant to the interim arbitration, and eventually subject to the final phase of this proceeding. Those orders, and future similar orders, will control modifications to interim amendments, and the effectiveness of subsequent amendments. On balance, CLCs language is unnecessary.

Moreover, other remedies to CLCs are available. That is, parties may use dispute resolution provisions in the underlying ICA to address disputed matters. Alternatively, parties may use the mediation, negotiation, and arbitration provisions of the Act and CPUC Resolution ALJ-178 to address replacement ICAs and amendments.

Therefore, CLCs' proposed dueling clause in not adopted. GTE's proposed dueling clause language is adopted.

O R D E R

IT IS ORDERED that:

1. By June 2, 2000, Pacific Bell Telephone Company (Pacific), and GTE California Incorporated (GTE), shall file and serve contract language consistent with the decisions in this Final Arbitrator's Report (FAR), including Chapter 7 (Conclusions). The contract language shall use Appendix DSL proposed by Pacific, and the Line Sharing Amendment proposed by GTE, modified as directed in the FAR. The contract language shall be in the form of an appendix or amendment that any competitive local exchange carrier (CLC) may adopt. Pacific and GTE shall also file and serve signed appendices or amendments to existing interconnection agreements (ICAs), and newly signed ICAs with appendices or amendments which provide for line sharing. The signed appendices or amendments to existing ICAs, and newly signed ICAs, shall be effective on or before June 6, 2000. Pacific and GTE may file and serve a Notice of Availability in lieu of serving signed appendices or amendments to existing ICAs, or newly signed ICAs, even if they are less than 75 pages. (Rule 2.3(c).)

2. By June 2, 2000, parties shall file and serve a statement which:

    a. identifies each criterion in the federal Telecommunications Act of 1996, and the California Public Utilities Commission's Rules of Practice and Procedure (e.g., 47 U.S.C. 252(e); Rules 2.18, 4.2.3, and 4.3.1 of Resolution ALJ-178) by which negotiated and arbitrated portions of ICAs must be tested;

    b. separately explains whether each negotiated and arbitrated portion of the appendices, amendments, and agreements at issue here pass or fail each test; and

    c. states whether or not the appendices, amendments, and agreements should be approved or rejected by the California Public Utilities Commission (CPUC).

3. Within 30 days of the date the FAR is filed and served, Pacific shall file and serve a complete Appendix DLE-DSL, including prices, terms, and conditions.

Within 90 days of the date the FAR is filed and served, GTE shall file and serve a complete appendix comparable to Pacific's Appendix DLE-DSL. Pacific's Appendix DLE-DSL and GTE's equivalent may be executed and become effective if jointly acceptable to the incumbent local exchange carrier (ILEC) and the CLC, but shall not become effective unless agreed to by both parties. Appendix DLE-DSL and GTE's equivalent may be used as the basis for negotiation, mediation, or arbitration under Section 252 of the federal Telecommunications Act of 1996, and CPUC Resolution ALJ-178.

4. Pacific and GTE shall comply without delay with any order of the Federal Communications Commission (FCC) that directs line sharing or transport over the fiber portion of the local loop. That compliance shall include, but is not limited to, Pacific filing and serving an amendment to Appendix DSL, and GTE filing and serving an amendment to its Line Sharing Amendment. Each amendment shall provide for line sharing or transport over fiber consistent with any FCC order, and with line sharing or transport to begin as ordered by the FCC.

5. No less than 30 days before the first day that Pacific first carries any form of digital subscriber line (xDSL) service over the fiber portion of the local loop for its own customer (or the customer of any corporate affiliate), Pacific shall file and serve an amendment to Appendix DSL. Pacific's amendment shall provide for line sharing or transport of CLC xDSL traffic over local loop fiber upon the same terms, conditions, and prices as provided by Pacific to itself or a corporate affiliate, effective upon filing.

6. No less than 30 days before the first day that GTE first carries xDSL service over the fiber portion of the local loop for its own customer (or the customer of any corporate affiliate), GTE shall file and serve an amendment to its Line Sharing Amendment. GTE's amendment shall provide for line sharing or

transport of CLC xDSL traffic over local loop fiber upon the same terms, conditions, and prices as provided by GTE to itself or a corporate affiliate, effective upon filing.

7. Pacific and GTE shall comply without delay with any order of the FCC that requires ILECs to provide access to the high frequency portion of the local loop as part of an unbundled network element platform. That compliance shall include, but is not limited to, Pacific filing and serving an amendment to Appendix DSL, and GTE filing and serving an amendment to its Line Sharing Amendment. The amendments shall provide for this service consistent with the FCC's order, with the service taking effect as ordered by the FCC, and with the amendments effective upon filing with the CPUC, unless suspended by the Director of the Telecommunications Division.

8. Pacific and GTE shall each maintain a memorandum account effective immediately. The memorandum account shall record revenues from the monthly recurring charge for access to the high frequency portion of the local loop (i.e., $5.85 for Pacific, $3.00 for GTE) related to xDSL sales. It shall include revenues from sales to CLCs, corporate affiliate CLCs, and an ILEC's sales of xDSL services to its own customers. Separately from the recording of access revenues, Pacific and GTE shall record revenues from monthly recurring charges, and non-recurring charges, assessed on any other line sharing rate for xDSL service that make a contribution to joint and common costs. The memorandum account shall be subject to interest, either by the application of interest on the balance, or the application of interest on any amounts later subject to true-up adjustment. Pacific and GTE shall report the balance in the memorandum account every three months to the Director of the Telecommunications Division, beginning October 1, 2000. The balance in the memorandum account shall be

subject to limited exogenous factor treatment under the CPUC's new regulatory framework program for Pacific and GTE.

9. Within 30 days of the date the FAR is filed and served, GTE shall file and serve a report. The report shall state what systems GTE is developing for full automation of operational support systems, along with GTE's planned dates for completion.

10. Within 30 days of the date the FAR is filed and served, Pacific shall file and serve a nondiscriminatory policy regarding removal of digital added main line devices if Pacific's policy is different than as required by the results in Issue 29 of the FAR.

11. Neither Pacific nor GTE shall decommission any copper line local loop plant when doing so would terminate a CLC's ability to offer, or continue to provide, xDSL service. Pacific and GTE shall maintain copper local loops so that CLCs have the ability to offer, or continue to provide, xDSL service. ILECs may, in the normal course of maintenance and upgrades, reuse copper lines for other purposes, but only if the copper loops stay in their existing locations and continue to be available for use by CLCs. This limitation applies only until line sharing or transport over fiber is resolved consistent with Ordering Paragraphs 3, 4, 5, and/or 6. Further, this limitation applies only for the life of the interim line sharing amendments, and expires unless specifically continued during the final portion of the line sharing phase when final prices are set in this matter.

Dated May 26, 2000, at San Francisco, California.

/s/ BURTON W. MATTSON
Burton W. Mattson
Arbitrator
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by first class mail this day served a true copy of the original attached Final Arbitrator's Report on all parties of record, or their attorneys of record, in the Interim Arbitration, Line Sharing Phase, in this proceeding. I have also served a true copy of the Final Arbitrator's Report by electronic mail on each party for which an electronic mail address has been provided.

Dated May 26, 2000, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.